Instructions for Employment Discrimination Claims Under Title VII

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5.0 Title VII Introductory Instruction

Model

In this case the Plaintiff _____ makes a claim under a Federal Civil Rights statute that prohibits employers from discriminating against an employee [prospective employee] in the terms and conditions of employment because of the employee's race, color, religion, sex, or national origin.

More specifically, [plaintiff] claims that [he/she] was [describe the employment action at issue] by the defendant _____ because of [plaintiff's] [protected status].

[Defendant] denies that [plaintiff] was discriminated against in any way. Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

Note on the Relationship Between Title VII Actions and Actions Brought Under the Equal Pay Act

A claim for sex-based wage discrimination can potentially be brought under either the Equal Pay Act, or Title VII, or both. There are some similarities, and some important differences, between a claim under the Equal Pay Act and a Title VII action for sex-based wage discrimination.

The most important similarity between the two actions is that the affirmative defenses set forth in the Equal Pay Act — (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; and (iv) a differential based on any other factor other than sex — are applicable to Title VII actions for sex-based wage discrimination. This was made clear by the Bennett Amendment to Title VII. See the discussion in *County of Washington v. Gunther*, 452 U.S. 161 (1981).

The most important differences between the two actions are:

1. The Equal Pay Act does not require proof of intent to discriminate. The plaintiff recovers under the Equal Pay Act by proving that she received lower pay for substantially equal work. In contrast, Title VII claims for disparate treatment require proof of an intent to discriminate. *See* Lewis

and Norman, *Employment Discrimination Law and Practice* § 7.15 (2d ed. 2001). But Title VII does not require the plaintiff to prove the EPA statutory requirements of "equal work" and "similar working conditions".

In *Gunther, supra*, the Supreme Court explained the importance of retaining Title VII recovery as an alternative to recovery under the Equal Pay Act:

> Under petitioners' reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief -- no matter how egregious the discrimination might be -- unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation. Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. Moreover, to cite an example arising from a recent case, *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), if the employer required its female workers to pay more into its pension program than male workers were required to pay, the only women who could bring a Title VII action under petitioners' interpretation would be those who could establish that a man performed equal work: a female auditor thus might have a cause of action while a female secretary might not. Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.

452 U.S. at 178-179.

2. Title VII's burden-shifting scheme (see Instructions 5.1.1, 5.1.2) differs from the burdens of proof applicable to an action under the Equal Pay Act. The difference was explained by the Third Circuit in *Stanziale v. Jargowsky*, 200 F.3d 101, 107-108 (3d Cir. 2000), a case in which the plaintiff brought claims under Title VII, the ADEA, and the Equal Pay Act:

> Unlike the ADEA and Title VII claims, claims based upon the Equal Pay Act, 29 U.S.C. § 206 et seq., do not follow the three-step burden-shifting framework of *McDonnell Douglas*; rather, they follow a two-step burden-shifting paradigm. The plaintiff must first establish a prima facie case by demonstrating that employees of the opposite sex were paid differently for performing "equal work"--work of substantially equal skill, effort and responsibility, under similar working conditions. *E.E.O.C. v. Delaware Dept. of Health and Social Services*, 865 F.2d 1408, 1413-14 (3rd Cir. 1989). The burden of persuasion then shifts to the employer to demonstrate the applicability of one of the four affirmative defenses specified in the Act. Thus, the employer's burden in an Equal Pay Act claim -- being one of ultimate persuasion -- differs significantly from its burden in an ADEA [or Title VII] claim.

> Because the employer bears the burden of proof at trial, in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense "so clearly that no rational jury could find to the contrary." *Delaware Dept. of Health*, 865 F.2d at 1414.
>
> The employer's burden is significantly different in defending an Equal Pay Act claim for an additional reason. The Equal Pay Act prohibits differential pay for men and women when performing equal work "*except where such payment is made pursuant to*" one of the four affirmative defenses. 29 U.S.C. § 206(d)(1) (emphasis added). We read the highlighted language of the statute as requiring that the employer submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity. See also *Delaware Dept. of Health*, 865 F.2d at 1415 (stating that "the correct inquiry was . . . whether, viewing the evidence most favorably to the [plaintiff], a jury could *only* conclude that the pay discrepancy resulted from" one of the affirmative defenses (emphasis added)). Thus, unlike an ADEA or Title VII claim, where an employer need not prove that the proffered legitimate nondiscriminatory reasons actually motivated the salary decision, in an Equal Pay Act claim, an employer must submit evidence from which a reasonable factfinder could conclude that the proffered reasons actually motivated the wage disparity.

3. The Equal Pay Act exempts certain specific industries from its coverage, including certain fishing and agricultural businesses. *See* 29 U.S.C. § 213. These industries are not, however, exempt from Title VII.

4. In contrast to Title VII, the Equal Pay Act has no coverage threshold defined in terms of the employer's number of employees.

5. The statute of limitations for backpay relief is longer under the EPA. As stated in Lewis and Norman, *Employment Discrimination Law and Practice* § 7.20 (2d ed. 2001):

> An EPA action is governed by the FLSA [Fair Labor Standards Act] statute of limitations. The FLSA provides a two year statute of limitations for filing, three years in the case of a "willful" violation. These statutes of limitation compare favorably from the plaintiff's perspective with the 180-day or 300-day administrative filing deadlines of Title VII.

Under Title VII, the statute of limitations for a pay claim begins to run upon the occurrence of an "unlawful employment practice," which, pursuant to the 2009 amendments to 42 U.S.C. § 2000e-5(e), can include "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." *Id.* § 2000e-5(e)(3)(A); *see Mikula v. Allegheny County*,

583 F.3d 181, 185-86 (3d Cir. 2009) (applying Section 2000e-5(e)(3)(A)).[1] This amendment brings the accrual date for a Title VII claim more in line with the EPA mechanism, in which an EPA claim arises each time the employee receives lower pay than male employees doing substantially similar work.

6. "The Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts." *County of Washington v. Gunther,* 452 U.S. 161, 175, n.14 (1981).

Where the plaintiff claims that wage discrimination is a violation of both Title VII and the Equal Pay Act, it will be necessary to give two sets of instructions, with the exception that the affirmative defenses provided by the Equal Pay Act (see Instructions 11.2.1-11.2.4) will be applicable to both claims. If a claim for sex-based wage discrimination is brought under Title VII only, then these Title VII instructions should be used, with the proviso that where sufficient evidence is presented, the defendant is entitled to an instruction on the affirmative defenses set forth in the Equal Pay Act. See Instructions 11.2.1-11.2.4 for instructions on those affirmative defenses.

Religious Organizations

Title VII allows religious organizations to hire and employ employees on the basis of their religious beliefs. 42 U.S.C. § 2000e-1(a) (Title VII claim for religious discrimination cannot be brought against a "religious corporation, association, educational institution or society"). In *Leboon v. Lancaster Jewish Community Center Assoc.,* 503 F.3d 217, 226 (3d Cir. 2007), the court listed the following factors as pertinent to whether a particular organization is within Title VII's exemption for religious organizations:

> Over the years, courts have looked at the following factors: (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

In *Leboon*, the court found the defendant, a Jewish Community Center, to be "primarily a religious organization" because it identified itself as such; it relied on coreligionists for financial support; area rabbis were involved in management decisions; and board meetings began with Biblical readings and

[1] *See also Noel v. Boeing Co.*, 2010 WL 3817090, at *6 (3d Cir. 2010) (holding that Section 2000e-5(e)(3)(A) "does not apply to failure-to-promote claims").

"remained acutely conscious of the Jewish character of the organization." The fact that the Center engaged in secular activities as well was not dispositive. *Id*. at 229-30. Accordingly the plaintiff, an evangelical Christian who was fired from her position as bookkeeper, could not recover under Title VII on grounds of religious discrimination.

By its terms, Title VII does not confer upon religious organizations the right to discriminate against employees on the basis of race, sex, and national origin. But with respect to claims for wrongful termination, the First Amendment's religion clauses give rise to an affirmative defense that "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012). Though *Hosanna-Tabor* involved a retaliation claim under the Americans with Disabilities Act, the Court's broad description of the issue suggests that its recognition of a "ministerial exception" may apply equally to wrongful-termination claims brought under other federal anti-discrimination statutes. *See id*. at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her…. [T]he ministerial exception bars such a suit.").

The *Hosanna-Tabor* Court did not specify which types of plaintiffs fall within the ministerial exception: It held that "the ministerial exception is not limited to the head of a religious congregation" but declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id*. at 707. The plaintiff in *Hosanna-Tabor* fell within the exception "[i]n light of … the formal title given [the plaintiff] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church." *Id*. at 708. *See also Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006) (pre-Hosanna-Tabor decision holding in a Title VII case that the ministerial exception "applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions").

Nor did the *Hosanna-Tabor* Court decide whether the ministerial exception extends beyond wrongful-termination claims. *See Hosanna-Tabor*, 132 S. Ct. at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."). *See also Petruska*, 462 F.3d at 308 n.11 (noting that the court was not deciding whether the ministerial exception would bar claims for hostile work environment sexual harassment).

The *Hosanna-Tabor* Court did make clear that, where the ministerial exception applies, it bars wrongful-termination claims regardless of the type of relief sought. *See Hosanna-Tabor*, 132 S. Ct. at 709. In addition, the ministerial exception applies even if the plaintiff asserts that the defendant's claimed religious reason for the firing is merely pretextual. *See id*.

Title VII Excludes RFRA Claims for Job-Related Federal Religious Discrimination:

In *Francis v. Mineta*, 505 F.3d 266, 270-71 (3d Cir. 2007), an employee attempted to bring an employment discrimination action under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4. (The employee had failed to exhaust administrative remedies with the EEOC, so Title VII was unavailable to him.) The court held that "nothing in RFRA alters the exclusive nature of Title VII with regard to employees' claims of religion-based employment discrimination." The court relied on the legislative history of RFRA, which demonstrated that "Congress did not intend RFRA to create a vehicle for allowing religious accommodation claims in the context of federal employment to do an end run around the legislative scheme of Title VII.."

Title VII Protection of Pregnancy:

In *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008), the plaintiff alleged that she was fired for having an abortion. She claimed protection under Title VII, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). The question of first impression in the Circuit was whether Title VII protects women who have elected to terminate their pregnancies. The court noted that the basic principle of the Pregnancy Discrimination Act "is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work." Id. at 364. The court relied on EEOC guidelines and the legislative history of the Pregnancy Discrimination Act to hold that "an employer may not discriminate against a woman employee because she has exercised her right to have an abortion." Id. at 365. The court held that for an employee to establish a *prima facie* case of pregnancy discrimination, she must show 1) that she was pregnant and that the employer knew it; 2) that she was qualified for her job; 3) that she suffered an adverse employment decision; and 4) that there was a "nexus" between her pregnancy or pregnancy-related decision and the adverse employment decision. Id. at 365.

On the subject of pension accrual rules that predated the enactment of the Pregnancy Discrimination Act, see *AT & T Corp. v. Hulteen*, 129 S. Ct. 1962, 1968 (2009) ("Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect to such rules that operated before the PDA.").

Interaction between disparate impact and disparate treatment principles

Concerning the interaction between disparate-impact and disparate-treatment principles under Title VII, *see Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (holding that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action," but also noting that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race"). *See also NAACP v. North Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 484-85 (3d Cir. 2011) (rejecting defendant's argument

that it should be allowed to maintain a residency requirement despite its disparate impact on African-Americans because the defendant feared disparate-treatment claims by Hispanic candidates).

Discrimination involving gender stereotypes

For a discussion of Title VII claims based on gender stereotyping, see *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) ("[I]t is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes.... Because both scenarios are plausible, the case presents a question of fact for the jury....").

5.1.1 Elements of a Title VII Claim— Disparate Treatment — Mixed-Motive

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff's] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]]; and

Second: [Plaintiff's] [protected status] was a motivating factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights.

In showing that [plaintiff's] [protected status] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] [protected status] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [plaintiff's protected status] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] [protected status] was a "motivating factor" if [his/her] [protected status] played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

[For use where defendant sets forth a "same decision" affirmative defense:[2]

If you find that [defendant's] treatment of [plaintiff] was motivated by both discriminatory and lawful reasons, you must decide whether [plaintiff] is entitled to damages. [Plaintiff] is not

[2] The Committee uses the term "affirmative defense" to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense.

entitled to damages if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] [protected class] had played no role in the employment decision.**]**

Comment

The Supreme Court has ruled that direct evidence is not required for a plaintiff to prove that discrimination was a motivating factor in a "mixed-motive" case, i.e., a case in which an employer had both legitimate and illegitimate reasons for making a job decision. *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003). The *Desert Palace* Court concluded that in order to be entitled to a mixed-motive instruction, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." Id. at 95-96 (internal quotation omitted). The mixed-motive instruction above — including the instruction on the affirmative defense — tracks the instructions approved in *Desert Palace*.

While direct evidence is not required to make out a mixed motive case, it is nonetheless true that the distinction between "mixed-motive" cases and "pretext" cases is often determined by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the plaintiff produces direct evidence of discrimination, this may be sufficient to show that the defendant's activity was motivated at least in part by animus toward a protected class, and therefore a "mixed-motive" instruction is warranted. If the evidence of discrimination is only circumstantial, then the defendant can argue that there was no animus at all, and that its employment decision can be explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly Instruction 5.1.2 should be given. *See generally Stackhouse v. Pennsylvania State Police*, 2006 WL 680871 at *4 (M.D.Pa. 2006) ("A pretext theory of discrimination is typically presented by way of circumstantial evidence, from which the finder of fact may infer the falsity of the employer's explanation to show bias. A mixed-motive theory of discrimination, however, is usually put forth by presenting evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.") (internal citations and quotations omitted).

On the proper use of a mixed-motive instruction — and the continuing viability of the mixed-motive/pretext distinction — see Matthew Scott and Russell Chapman, *Much Ado About Nothing — Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Discrimination Cases To Mixed-Motive*, 36 St. Mary's L.J. 395 (2005):

> Thus, a case properly analyzed under [42 U.S.C.] § 2000e-2(a) (what some commentators refer to as pretext cases) involves the plaintiff alleging an improper motive for the defendant's conduct, while the defendant disavows that motive and professes only a non-discriminatory motive. On the other hand, a true mixed motive case under [42 U.S.C.] § 2000e-2(m) involves either a defendant who . . . *admits* to a partially discriminatory reason for its actions, while also claiming it would have taken the same action were it not for the illegitimate rationale or . . . [there is] otherwise credible evidence to support such a finding.

> The rationale for the distinction . . . is simple. When the defendant renounces any illegal motive, it puts the plaintiff to a higher standard of proof that the challenged employment action was taken *because of* the plaintiff's race/color/religion/sex/national origin. But, the plaintiff, if successful, is entitled to the full panoply of damages under § 2000e-5. . . .
>
> At the same time, where the defendant is contrite and admits an improper motive (something no jury will take lightly), or there is evidence to support such a finding, the defendant's liability risk is reduced to declaratory relief, attorneys' fees and costs if the defendant proves it would have taken the same action even without considering the protected trait. The quid pro quo for this reduced financial risk is the lesser standard of liability (the challenged employment action need only be a motivating factor).

Thus, the distinction between mixed-motive and pretext cases is retained after *Desert Palace*. The Third Circuit has indicated that it retains that distinction. *See, e.g., Makky v. Chertoff*, 541 F.3d 205, 215 (3d Cir. 2008) ("A Title VII plaintiff may state a claim for discrimination under either the pretext theory set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or the mixed-motive theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), under which a plaintiff may show that an employment decision was made based on both legitimate and illegitimate reasons."). *See also Hanes v. Columbia Gas of Pennsylvania Nisource Co.*, 2008 WL 3853342 at *4, n.12 (M.D. Pa. 2008) (Third Circuit "adheres to a distinction between 'pretext' cases, in which the employee asserts that the employer's justification for an adverse action is false, and 'mixed-motives' cases, in which the employee asserts that both legitimate and illegitimate motivations played a role in the action"; "determinative factor" analysis applies to the former and "motivating factor" analysis applies to the latter).

Whether to give a mixed-motive or a pretext instruction (or both) is a question of law for the court. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1097-98 (3d Cir.1995). *See also Urban v. Beyer Corp. Pharmaceutical Div.*, 2006 WL 3289946 (D.N.J. 2006) (analyzing discrimination claim first under mixed-motive theory and then under pretext theory).

"Same Decision" Affirmative Defense in Mixed-Motive Cases

Where the plaintiff has shown intentional discrimination in a mixed motive case, the defendant can still avoid liability for money damages by demonstrating by a preponderance of the evidence that the same decision would have been made even in the absence of the impermissible motivating factor. If the defendant establishes this defense, the plaintiff is then entitled only to declaratory and injunctive relief, attorney's fees and costs. Orders of reinstatement, as well as the substitutes of back and front pay, are prohibited if a same decision defense is proven. 42 U.S.C. §2000e-5(g)(2)(B).

Failure to Rehire as an Adverse Employment Action

In *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008), the court held that the failure to renew an employment arrangement, "whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII." The Instruction accordingly contains a bracketed alternative for failure to renew an employment arrangement as an adverse employment action.

Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for Employment

In *Makky v. Chertoff*, 541 F.3d 205, 215 (3d Cir. 2008), the court held that "a mixed-motive plaintiff has failed to establish a prima facie case of a Title VII employment discrimination claim if there is unchallenged objective evidence that s/he did not possess the minimal qualifications for the position plaintiff sought to obtain or retain." The court noted that "[i]n this respect at least, requirements under *Price Waterhouse* do not differ from those of *McDonnell Douglas*." The *Makky* court emphasized that the requirement of an objective qualification was minimal and would arise only in specific and limited fact situations where the plaintiff "does not possess the objective baseline qualifications to do his/her job will not be entitled to avoid dismissal." The court explained the minimal qualification requirement as follows:

> This involves inquiry only into the bare minimum requirement necessary to perform the job at issue. *Typically, this minimum requirement will take the form of some type of licensing requirement, such as a medical, law, or pilot's license, or an analogous requirement measured by an external or independent body rather than the court or the jury.* * * * We caution that we are not imposing a requirement that mixed-motive plaintiffs show that they were subjectively qualified for their jobs, i.e., performed their jobs well. Rather, we speak only in terms of an absolute minimum requirement of qualification, best characterized in those circumstances that require a license or a similar prerequisite in order to perform the job.

Id. (Emphasis added.)

The *Makky* court held that the determination of whether a plaintiff had obtained an objective qualification for employment is a question of fact. But it would be extremely rare for the court to have to instruct the jury on whether the plaintiff has met an objective job requirement within the meaning of *Makky*. The examples given by the court are in the nature of licenses or certifications by an external body ─ in the vast majority of cases, the parties will not dispute whether the license or certification was issued. (In *Makky*, the requirement was that the employee have a security clearance, and he could not contest that his clearance was denied.) In the rare case in which the existence of an objective externally-imposed qualification raises a question of fact, the court will need to add a third element to the basic instruction. For example:

Third: [Plaintiff] was [properly licensed] [met the requirements of an independent body that set minimum requirements for [plaintiff's] job].

Animus of Employee Who Was Not the Ultimate Decisionmaker

Construing a statute that contains similar motivating-factor language, the Supreme Court ruled that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under [the Uniformed Services Employment and Reemployment Rights Act of 1994]" even if the ultimate employment decision is taken by one other than the supervisor with the animus. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (footnotes omitted). The Court did not explicitly state whether this ruling extends to claims under 42 U.S.C. § 2000e-2(m) (which also refers to discrimination as a motivating factor), though it noted the similarity between Section 2000e-2(m)'s language and that of the USERRA.

5.1.2 Elements of a Title VII Claim – Disparate Treatment — Pretext

Model

In this case [plaintiff] is alleging that [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire [plaintiff]] [failed to renew [plaintiff's] employment arrangement] [failed to promote [plaintiff]] [demoted [plaintiff]] [terminated [plaintiff]] [constructively discharged [plaintiff]]; and

Second: [Plaintiff's] [protected status] was a determinative factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for discrimination.

Ultimately, you must decide whether [plaintiff] has proven that [his/her] [protected status] was a determinative factor in [defendant's employment decision.] "Determinative factor" means that if not for [plaintiff 's] [protected status], the [adverse employment action] would not have occurred.

Comment

On the distinction between mixed-motive and pretext cases (and the continuing viability of that distinction), see the Commentary to Instruction 5.1.1.

The McDonnell Douglas Burden-Shifting Test

The Instruction does not charge the jury on the complex burden-shifting formula established for pretext cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas* formula a plaintiff who proves a prima facie case of discriminatory treatment raises a presumption of intentional discrimination. The defendant then has the burden of production, not persuasion, to rebut the presumption of discrimination by articulating a nondiscriminatory reason for its actions. If the defendant does articulate a nondiscriminatory reason, the plaintiff must prove intentional discrimination by demonstrating that the defendant's proffered reason was a pretext, hiding the real discriminatory motive.

In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (3d Cir. 1998), the Third Circuit declared that "the jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision." The court also stated, however, that "[t]his does not mean that the instruction should include the technical aspects of the *McDonnell Douglas* burden shifting, a charge reviewed as unduly confusing and irrelevant for a jury." The court concluded as follows:

> Without a charge on pretext, the course of the jury's deliberations will depend on whether the jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from the evidence establishing plaintiff's prima facie case and the pretextual nature of the employer's proffered reasons for its actions. It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.

In *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 347 n.1 (3d Cir. 1999), the Third Circuit gave extensive guidance on the place of the *McDonnell Douglas* test in jury instructions:

> The short of it is that judges should remember that their audience is composed of jurors and not law students. Instructions that explain the subtleties of the *McDonnell Douglas* framework are generally inappropriate when jurors are being asked to determine whether intentional discrimination has occurred. To be sure, a jury instruction that contains elements of the *McDonnell Douglas* framework may sometimes be required. For example, it has been suggested that "in the rare case when the employer has not articulated a legitimate nondiscriminatory reason, the jury must decide any disputed elements of the prima facie case

> and is instructed to render a verdict for the plaintiff if those elements are proved." *Ryther* [*v. KARE 11*], 108 F.3d at 849 n.14 (Loken, J., for majority of en banc court). But though elements of the framework may comprise part of the instruction, judges should present them in a manner that is free of legalistic jargon. In most cases, of course, determinations concerning a prima facie case will remain the exclusive domain of the trial judge.

On proof of intentional discrimination, see *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-1067 (3d Cir. 1996) ("[T]he elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.").

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993), the Supreme Court stated that a plaintiff in a Title VII case always bears the burden of proving whether the defendant intentionally discriminated against the plaintiff. The instruction follows the ruling in *Hicks*.

Determinative Factor

The reference in the instruction to a "determinative factor" is taken from *Watson v. SEPTA*, 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is "determinative factor", while the appropriate term in mixed-motive cases is "motivating factor"). *See also LeBoon v. Lancaster Jewish Community Ctr.*, 503 F.3d 217, 232 n.8 (3d Cir. 2007) (in a pretext case, the plaintiff must show that the prohibited intent was a "***determinative factor***" for the job action) (emphasis in original); *Atkinson v. Lafayette College*, 460 F.3d 447, 455 (3d Cir. 2006) ("Faced with legitimate, non-discriminatory reasons for Lafayette College's actions, the burden of proof rested with Atkinson to demonstrate that the reasons proffered were pretextual and that gender was a determinative factor in the decisions."); *Hanes v. Columbia Gas of Pennsylvania Nisource Co.*, 2008 WL 3853342 at *4, n.12 (M.D. Pa. 2008) (Third Circuit "adheres to a distinction between 'pretext' cases, in which the employee asserts that the employer's justification for an adverse action is false, and 'mixed-motives' cases, in which the employee asserts that both legitimate and illegitimate motivations played a role in the action"; "determinative factor" analysis applies to the former and "motivating factor" analysis applies to the latter).

The plaintiff need not prove that the plaintiff's protected status was the only factor in the challenged employment decision, but the plaintiff must prove that the protected status was a determinative factor. For example, if the employer fires women who steal office supplies but not men who steal office supplies, then the women's gender is a determinative factor in the firing even though there is another factor (stealing office supplies) which if applied uniformly might have justified the challenged employment decision. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.").

Pretext

The Third Circuit described standards for proof of pretext in *Doe v. C.A.R.S. Protection Plus*,

Inc. 527 F.3d 358, 370 (3d Cir. 2008):

> In order to show pretext, a plaintiff must submit evidence which (1) casts doubt upon the legitimate reason proffered by the employer such that a fact-finder could reasonably conclude that the reason was a fabrication; or (2) would allow the fact-finder to infer that discrimination was more likely than not a motivating or determinative cause of the employee's termination. See *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994); *Chauhan v. M. Alfieri Co., Inc.*, 897 F.2d 123, 128 (3d Cir. 1990). Put another way, to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a fact-finder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, that the proffered reason is a pretext).

The *Doe* court's reference to "a motivating *or* determinative cause" in the pretext test seems to indicate that the two terms are interchangeable. But they are not, because a factor might "motivate" conduct and yet not be the "determinative" cause of the conduct — proof that the factor was determinative is thus a more difficult burden. The very distinction between pretext and mixed-motive cases is that in the former the plaintiff must show that discrimination is the "determinative" factor for the job action, while in the latter former the plaintiff need only prove that discrimination is a "motivating" (i.e., one among others) factor. *See, e.g., Stackhouse v. Pennsylvania State Police,* 2006 WL 680871 at *4 (M.D.Pa. 2006) ("Whether a case is classified as one of pretext or mixed-motive has important consequences on the burden that a plaintiff has at trial, and hence on the instructions given to the jury"; "determinative factor" analysis applies to the former and "motivating factor" analysis applies to the latter) (citing *Watson v. SEPTA,* 207 F.3d 207, 214-15 & n. 5 (3d Cir. 2000)). Accordingly, the instruction on pretext follows the standards set forth in *Doe* and *Fuentes,* with the exception that it uses only the term "determinative" and not the term "motivating."

Business Judgment

On the "business judgment" portion of the instruction, see *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir.1991), where the court stated that "[b]arring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions." The *Billet* court noted that "[a] plaintiff has the burden of casting doubt on an employer's articulated reasons for an employment decision. Without some evidence to cast this doubt, this Court will not interfere in an otherwise valid management decision." The *Billet* court cited favorably the First Circuit's decision in *Loeb v. Textron, Inc*., 600 F.2d 1003, 1012 n. 6 (1st Cir.1979), where the court stated that "[w]hile an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination."

Failure to Rehire as an Adverse Employment Action

In *Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008), the court held that the failure to renew an employment arrangement, "whether at-will or for a limited

period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII." The Instruction accordingly contains a bracketed alternative for failure to renew an employment arrangement as an adverse employment action.

Failure of Employee to Satisfy an Objective Externally-Imposed Standard Necessary for Employment

In *Makky v. Chertoff*, 541 F.3d 205, 215 (3d Cir. 2008), the court declared that in both pretext and mixed-motive cases, a plaintiff "has failed to establish a prima facie case of a Title VII employment discrimination claim if there is unchallenged objective evidence that s/he did not possess the minimal qualifications for the position plaintiff sought to obtain or retain." The court explained the minimal qualification requirement as a narrow one best expressed as "circumstances that require a license or a similar prerequisite in order to perform the job."

It would be extremely rare for the court to have to instruct the jury on whether the plaintiff has met an objective job requirement within the meaning of *Makky*. The examples given by the court are in the nature of licenses or certifications by an external body — in the vast majority of cases, the parties will not dispute whether the license or certification was issued. In the rare case in which the existence of an objective externally-imposed qualification raises a question of fact, the court will need to add a third element to the basic instruction. For example:

> Third: [Plaintiff] was [properly licensed] [met the requirements of an independent body that set minimum requirements for [plaintiff's] job].

5.1.3 Elements of a Title VII Claim — Harassment — Quid Pro Quo

Model

[Plaintiff] alleges that [his/her] supervisor [name of supervisor], subjected [him/her] to harassment. It is for you to decide whether [employer] is liable to [plaintiff] for the actions of [supervisor].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe activity] by [supervisor], because of [plaintiff's] [sex] [race] [religion] [national origin];

Second: [Supervisor's] conduct was not welcomed by [plaintiff];

Third: [Plaintiff's] submission to [supervisor's] conduct was an express or implied condition for receiving a job benefit or avoiding a job detriment;[3]

Fourth: [Plaintiff] was subjected to an adverse "tangible employment action"; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits; and

Fifth: [Plaintiff's] [rejection of] [failure to submit to] [supervisor's] conduct was a motivating factor in the decision to [describe the alleged tangible employment action].

If any of the above elements has not been proved by the preponderance of the evidence, your verdict must be for [defendant] and you need not proceed further in considering this claim.

[When a jury question is raised as to whether the harassing employee is the plaintiff's supervisor, the following instruction may be given:

[Defendant] is liable for any discriminatory harassment the plaintiff has proven if the plaintiff also proves by a preponderance of the evidence that [name of person] is a supervisor. A supervisor is one who had the power to hire, fire, demote, transfer, or discipline [plaintiff], to set work schedules and pay rates, or to make other decisions that would affect the terms and conditions of [plaintiff's] employment, whether exercised alone or in connection with others.**]**

[3] This third element in the Instruction may require modification in some cases. See the Comment's discussion of *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 282 (3d Cir. 2000), *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), and 29 C.F.R. § 1604.11(a)(2).

Comment

Instructions 5.1.3 through 5.1.5 address claims for harassment in violation of Title VII. A plaintiff asserting such a claim must show discrimination and must also establish the employer's liability for that discrimination.[4] The framework applicable to those two questions will vary depending on the specifics of the case.

The Supreme Court has declared that the "quid pro quo" and "hostile work environment" labels are not controlling for purposes of establishing employer liability. But the two terms do provide a basic demarcation for the kinds of harassment actions that are brought under Title VII. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 750 (1998) ("The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility. . . . The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive.") In other words, these terms retain significance with respect to the first inquiry (showing discrimination) rather than the second (determining employer liability).

Showing discrimination. One way to show discrimination is through what is known as a "quid pro quo" claim; Instruction 5.1.3 provides a model for instructions on such a claim. Another way to show discrimination is through what is termed a "hostile work environment" claim; Instructions 5.1.4 and 5.1.5 provide models for instructions on such claims.

Instruction 5.1.3's third element is appropriate for use in quid pro quo cases where the supervisor expressly or impliedly conditioned a job benefit (or avoidance of a job detriment) on the plaintiff's submission to supervisor's conduct at the time of the conduct. "However, [Third Circuit] law contains no requirement that the plaintiff show that the employer implicitly or explicitly threatened retaliation when making the advance." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 282 (3d Cir. 2000). So long as the plaintiff shows "that his or her response to unwelcome advances was subsequently used as a basis for a decision about compensation, etc. ...., the plaintiff need not show that submission was linked to compensation, etc. at or before the time when the advances occurred." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997), *abrogated on other grounds by Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). *See also* 29 C.F.R. § 1604.11(a)(2). In a case where the plaintiff rests the quid pro quo claim on the argument that the plaintiff's response was subsequently used as a basis for a decision concerning a job benefit or detriment, the third element in the model instruction should be revised or omitted.

Employer liability. Where an employee suffers an adverse tangible employment action as a result of a supervisor's discriminatory harassment, the employer is strictly liable for the supervisor's

[4] A supervisor cannot be liable under Title VII for acts of harassment. *See Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996) (concluding "that Congress did not intend to hold individual employees liable under Title VII").

conduct. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (stating that "there is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown").

By contrast, when no adverse tangible employment action occurred, the employer has an affirmative defense:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765.

Instruction 5.1.3 is designed for use in cases that involve a tangible employment action. The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). It should be noted that the failure to renew an employment arrangement can also constitute an adverse employment action. *See Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure to renew an employment arrangement, "whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII"). As discussed below, it is possible that a plaintiff might frame a case as a quid pro quo case even though it does not involve evidence of an adverse tangible employment action; in such instances, the *Ellerth / Faragher* affirmative defense will be available. See Instruction 5.1.5 for an instruction on that affirmative defense.

Unfulfilled threats. In some instances, a supervisor might threaten an adverse employment action but fail to act on the threat after the plaintiff rejects the supervisor's advances. In such a scenario, it is necessary to consider the implications for both the question of discrimination and the question of employer liability. On the question of discrimination, because such a claim "involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct." *Ellerth*, 524 U.S. at 754. And on the question of employer liability, because such a claim involves no tangible employment action, the *Ellerth / Faragher* affirmative defense will be available. In sum, such a case should be analyzed under the framework set forth in Instruction and Comment 5.1.5.

Submission to demands. In other instances, a supervisor's threat of an adverse employment action might succeed in securing the plaintiff's submission to the supervisor's demand and the

supervisor might therefore take no adverse tangible employment action of a sort that would be reflected in the official records of the employer. On the question of proving discrimination, it is not entirely clear whether Third Circuit caselaw would require a "hostile environment" analysis in such a case. The *Robinson* court suggested in dictum that in

> cases in which an employee is told beforehand that his or her compensation or some other term, condition, or privilege of employment will be affected by his or her response to the unwelcome sexual advances .... , a quid pro quo violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances. At that point, the employee has been subjected to discrimination because of sex.... Whether the employee thereafter submits to or rebuffs the advances, a violation has nevertheless occurred.

Robinson, 120 F.3d at 1297. This aspect of *Robinson* is no longer good law with respect to cases in which the plaintiff rebuffs the supervisor's advances and no adverse tangible employment action occurs; as noted above, under *Ellerth* a plaintiff in such a case would need to meet the hostile environment standard for proving discrimination. What is less clear is whether the same is true for cases in which the plaintiff submits to the supervisor's advances. Neither *Ellerth* nor *Faragher* was such a case and those cases do not directly illuminate the question.

Similarly, on the question of employer liability *Ellerth* and *Faragher* do not directly address whether the *Ellerth / Faragher* affirmative defense would be available in such a case. The Second and Ninth Circuits have answered this question in the negative. The Second Circuit concluded that when a supervisor conditions an employee's continued employment on the employee's submission to the supervisor's sexual demands and the employee submits, this "classic quid pro quo" constitutes a tangible employment action that deprives the employer of the affirmative defense. *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002). In such a situation, the *Jin* court reasoned, it is the supervisor's "empowerment ... as an agent who could make economic decisions affecting employees under his control that enable[s] him to force [the employee] to submit." *Id.; see also id.* at 98 (stating that supervisor's "use of his supervisory authority to require [plaintiff's] submission was, for Title VII purposes, the act of the employer"). The Ninth Circuit has followed *Jin*, concluding that "a 'tangible employment action' occurs when the supervisor threatens the employee with discharge and, in order to avoid the threatened action, the employee complies with the supervisor's demands." *Holly D. v. California Institute of Technology*, 339 F.3d 1158, 1167 (9th Cir. 2003).

Though the Third Circuit cited *Jin*'s reasoning with approval in *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), it is unclear whether this fact supports or undermines *Jin*'s persuasiveness in this circuit. On the one hand, in *Suders* the court of appeals endorsed *Jin*'s rationale: "in quid pro quo cases where a victimized employee submits to a supervisor's demands for sexual favors in return for job benefits, such as continued employment.... the more sensible approach ... is to recognize that, by his or her actions, a supervisor invokes the official authority of the enterprise." *Suders*, 325 F.3d at 458-59. But the *Suders* court did so in the course of holding that "a constructive discharge, when proved, constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*,"325

F.3d at 435 – a point on which the Supreme Court reversed, *see Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004) (holding that in order to count as a tangible employment action the constructive discharge must result from "an employer-sanctioned adverse action").

It could be argued that *Jin* and *Holly D.* rest in tension with *Ellerth, Faragher* and *Suders*, given that when the plaintiff submits to a supervisor's demand and no tangible employment action of an official nature is taken the supervisor's acts are not as readily attributable to the company, *see Ellerth*, 524 U.S. at 762 (stressing that tangible employment actions are usually documented, may be subject to review by the employer, and may require the employer's approval); *see also Lutkewitte v. Gonzales*, 436 F.3d 248, 263 (D.C. Cir. 2006) (Brown, J., concurring in judgment) (arguing that the panel majority should have rejected *Jin* and *Holly D*. rather than avoiding the question, and reasoning that "the unavailability of the affirmative defense in cases where a tangible employment action has taken place is premised largely on the notice (constructive or otherwise) that such an action gives to the employer-notice that the delegated authority is being used to discriminate against an employee"). *But see Jin*, 310 F.3d at 98 ("though a tangible employment action 'in most cases is documented in official company records, and *may* be subject to review by higher level supervisors,' the Supreme Court did not require such conditions in all cases.") (quoting, with added emphasis, *Ellerth*, 524 U.S. at 762).

If the court concludes that it is appropriate to follow the approach taken in *Jin* and *Holly D.* – a question that, as noted above, appears to be unsettled – then the court should consider whether to refer only to a 'tangible employment action' rather than an 'adverse tangible employment action.' *See Jin*, 310 F.3d at 101 (holding that it was error to "use[] the phrase 'tangible adverse action' instead of 'tangible employment action'" and that such error was "especially significant in the context of this case, where we hold that an employer is liable when a supervisor grants a tangible job benefit to an employee based on the employee's submission to sexual demands").

Definition of "supervisor." In *Jackson v. T & N Van Service*, 86 F. Supp. 2d 497, 501 (E.D. Pa. 2000), the court provided this guidance on whether a harassing employee is a "supervisor" so that the employer can be found liable for a hostile work environment/tangible employment action claim:

> Although the Supreme Court has not specifically defined the term supervisor for purposes of determining an employer's liability for a hostile work environment, the Court has described the power to supervise as "to hire and fire, and to set work schedules and pay rates." *Faragher*, 524 U.S. at 803; see also *Gentner v. Cheyney University of Pennsylvania*, No. CIV. A. 94-7443, 1999 WL 820864, *18 (E.D.Pa. Oct.14, 1999) (charging jury to consider same factors in determining whether individual was plaintiff's supervisor). Plaintiff has the burden of proof to show that Larose, Felton and Larosa were his supervisors. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir.1990).

5.1.4 Elements of a Title VII Action — Harassment — Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [protected status].

[Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] is a [membership in a protected class].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable [member of plaintiff's protected class] reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Sixth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Seventh: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of [protected class] harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

Comment

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 5.2.1.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[5] Instruction 5.2.2 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases. In *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. "Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue." As ADA damages are coextensive with Title VII damages — see the Comment to Instruction 9.4.1 — the ruling from *Spencer* appears to be applicable to Title VII hostile work environment cases.

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). It should be noted that the failure to renew an employment arrangement can also constitute an adverse employment action. *See Wilkerson v. New Media Tech. Charter School, Inc.*, 522 F.3d 315, 320 (3d Cir. 2008) (holding that the failure to renew an employment arrangement, "whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII").

Liability for Non-Supervisors

Respondeat superior liability for harassment by non-supervisory employees exists only where the employer "knew or should have known about the harassment, but failed to take prompt and adequate remedial action." *Jensen v. Potter,* 435 F.3d 444, 453 (3d Cir. 2006) (internal quotations omitted).[6] *See also Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

> [T]here can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all

[5] Instruction 5.1.4 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 5.1.5 should be used instead. *See* Comment 5.1.5 (discussing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 150 (2004).

[6] "[E]mployer liability for co-worker harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action." *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009).

misconduct that may occur in the workplace.

The court of appeals has drawn upon agency principles for guidance on the definition of "management level" personnel:

> [A]n employee's knowledge of allegations of coworker sexual harassment may typically be imputed to the employer in two circumstances: first, where the employee is sufficiently senior in the employer's governing hierarchy, or otherwise in a position of administrative responsibility over employees under him, such as a departmental or plant manager, so that such knowledge is important to the employee's general managerial duties. In this case, the employee usually has the authority to act on behalf of the employer to stop the harassment, for example, by disciplining employees or by changing their employment status or work assignments....
>
> Second, an employee's knowledge of sexual harassment will be imputed to the employer where the employee is specifically employed to deal with sexual harassment. Typically such an employee will be part of the employer's human resources, personnel, or employee relations group or department. Often an employer will designate a human resources manager as a point person for receiving complaints of harassment. In this circumstance, employee knowledge is imputed to the employer based on the specific mandate from the employer to respond to and report on sexual harassment.

Huston v. Procter & Gamble Paper Prods. Corp., 568 F.3d 100, 107-08 (3d Cir. 2009).

For a case in which a jury question was raised as to whether the employer's efforts to remedy a non-supervisor's harassment were prompt and adequate, *see Andreoli v. Gates*, 482 F.3d 641, 648 (3d Cir. 2007) (Rehabilitation Act) (employee had to speak to five supervisors in order to elicit any response from management about the non-supervisor's acts of harassment, and even then the employer took five months to move the employee to a different shift; no attempts were made to discipline or instruct the harassing employee).

Characteristics of a Hostile Work Environment

In sexual harassment cases, examples of conduct warranting a finding of a hostile work environment include verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. See *Harris v. Forklift Systems*, Inc., 510 U.S. 17, 21 (1993) ("discriminatory intimidation, ridicule, and insult"); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (repeated demands for sexual favors, fondling, following plaintiff into women's restroom, and supervisor's exposing himself).

The Third Circuit has described the standards for a hostile work environment claim, as

applied to sex discrimination, in *Weston v. Pennsylvania,* 251 F.3d 420, 425-426 (3d Cir. 2001):

> Hostile work environment harassment occurs when unwelcome sexual conduct unreasonably interferes with a person's performance or creates an intimidating, hostile, or offensive working environment. . . . In order to be actionable, the harassment must be so severe or pervasive that it alters the conditions of the victim's employment and creates an abusive environment. *Spain v. Gallegos*, 26 F.3d 439, 446-47 (3d Cir.1994).
>
> In *Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993), the Supreme Court clarified the elements of a discrimination claim resulting from a hostile work environment. In order to fall within the purview of Title VII, the conduct in question must be severe and pervasive enough to create an "objectively hostile or abusive work environment--an environment that a reasonable person would find hostile--and an environment the victim-employee subjectively perceives as abusive or hostile." In determining whether an environment is hostile or abusive, we must look at numerous factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance."

Title VII protects only against harassment based on discrimination against a protected class. It is not "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80-81 (1998). "Many may suffer severe harassment at work, but if the reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no relief."*Jensen v. Potter*, 435 F.3d 444, 447 (3d Cir. 2006).

Severe or Pervasive Activity

The terms "severe or pervasive" set forth in the instruction are in accord with Supreme Court case law and provide for alternative possibilities for finding harassment. See *Jensen v. Potter*, 435 F.3d 444, 447, n.3 (3d Cir. 2006) ("The disjunctive phrasing means that 'severity' and 'pervasiveness' are alternative possibilities: some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.") (quoting 2 C.Sullivan et. al., *Employment Discrimination Law and Practice* 455 (3d ed. 2002).

Subjective and Objective Components

The Supreme Court in *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." The instruction accordingly sets forth both objective and subjective components.

Hostile Work Environment That Pre-exists the Plaintiff's Employment

The instruction refers to harassing "conduct" that "was motivated by the fact that [plaintiff] is

a [membership in a protected class]." This language is broad enough to cover the situation where the plaintiff is the first member of a protected class to enter the work environment, and the working conditions pre-existed the plaintiff's employment. In this situation, the "conduct" is the refusal to change an environment that is hostile to members of the plaintiff's class. The court may wish to modify the instruction so that it refers specifically to the failure to correct a pre-existing environment.

Harassment as Retaliation for Protected Activity

In *Jensen v. Potter*, 435 F.3d 444, 446 (3d Cir. 2006), the court held that the retaliation provision of Title VII "can be offended by harassment that is severe or pervasive enough to create a hostile work environment." The *Jensen* court also declared that "our usual hostile work environment framework applies equally to Jensen's claim of retaliatory harassment." But subsequently the Supreme Court in *Burlington N. & S.F. Ry. Co. v. White*, 548 U.S.53, 68 (2006), set forth a legal standard for determining retaliation that appears to be less rigorous than the standard for determining a hostile work environment. The Court in *White* declared that a plaintiff has a cause of action for retaliation under Title VII if the employer's actions in response to protected activity "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." After *White*, the Title VII retaliation provision can be offended by any activity of the employer ― whether harassment or some other action ― that satisfies the *White* standard. See Instruction 5.1.7 for a general instruction on retaliation in Title VII actions.

Religious Discrimination

Employees subject to a hostile work environment on the basis of their religion are entitled to recovery under Title VII, pursuant to the same legal standards applied to sex discrimination. *See Abramson v. William Paterson College*, 260 F.3d 265, 277 n.5 (3d Cir. 2001) ("We have yet to address a hostile work environment claim based on religion. However, Title VII has been construed under our case law to support claims of a hostile work environment with respect to other categories (i.e., sex, race, national origin). We see no reason to treat Abramson's hostile work environment claim any differently, given Title VII's language.").

5.1.5 Elements of a Title VII Claim — Harassment — Hostile Work Environment — No Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [protected status].

[Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Second: [Names] conduct was not welcomed by [plaintiff].

Third: [Names] conduct was motivated by the fact that [plaintiff] is a [membership in a protected class].

Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of a reasonable [member of plaintiff's protected class] reaction to [plaintiff's] work environment.

Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

[For use when the alleged harassment is by non-supervisory employees:

Sixth: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of [protected class] harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

If any of the above elements has not been proved by a preponderance of the evidence, your verdict must be for [defendant] and you need not proceed further in considering this claim. If you find that the elements have been proved, then you must consider [employer's] affirmative defense. I will instruct you now on the elements of that affirmative defense.

You must find for [defendant] if you find that [defendant] has proved both of the following elements by a preponderance of the evidence:

First: [Defendant] exercised reasonable care to prevent harassment in the workplace on the basis of [protected status], and also exercised reasonable care to promptly correct any

harassing behavior that does occur.

Second: [Plaintiff] unreasonably failed to take advantage of any preventive or corrective opportunities provided by [defendant].

Proof of the four following facts will be enough to establish the first element that I just referred to, concerning prevention and correction of harassment:

1. [Defendant] had established an explicit policy against harassment in the workplace on the basis of [protected status].

2. That policy was fully communicated to its employees.

3. That policy provided a reasonable way for [plaintiff] to make a claim of harassment to higher management.

4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].

On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure provided by [defendant] will ordinarily be enough to establish that [plaintiff] unreasonably failed to take advantage of a corrective opportunity.

Comment

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 5.2.1.

This instruction is to be used in discriminatory harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from harassment that is "sufficiently severe or pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751 (1998).

Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment action also justifies requiring the plaintiff to prove a further element, in order to protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor employees. Respondeat

superior liability for the acts of non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990).[7] *See also Kunin v. Sears Roebuck and Co.,* 175 F.3d 289, 294 (3d Cir. 1999):

> [T]here can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace.

The court of appeals has drawn upon agency principles for guidance on the definition of "management level" personnel:

> [A]n employee's knowledge of allegations of coworker sexual harassment may typically be imputed to the employer in two circumstances: first, where the employee is sufficiently senior in the employer's governing hierarchy, or otherwise in a position of administrative responsibility over employees under him, such as a departmental or plant manager, so that such knowledge is important to the employee's general managerial duties. In this case, the employee usually has the authority to act on behalf of the employer to stop the harassment, for example, by disciplining employees or by changing their employment status or work assignments....
>
> Second, an employee's knowledge of sexual harassment will be imputed to the employer where the employee is specifically employed to deal with sexual harassment. Typically such an employee will be part of the employer's human resources, personnel, or employee relations group or department. Often an employer will designate a human resources manager as a point person for receiving complaints of harassment. In this circumstance, employee knowledge is imputed to the employer based on the specific mandate from the employer to respond to and report on sexual harassment.

Huston v. Procter & Gamble Paper Prods. Corp., 568 F.3d 100, 107-08 (3d Cir. 2009).

Characteristics of a Hostile Work Environment

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[7] "[E]mployer liability for co-worker harassment exists only if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action." *Huston v. Procter & Gamble Paper Prods. Corp.,* 568 F.3d 100, 105 (3d Cir. 2009).

In sexual harassment cases, examples of conduct warranting a finding of a hostile work environment include verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris v. Forklift Systems*, Inc., 510 U.S. 17 (1993) (discriminatory intimidation, ridicule and insult); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (repeated demands for sexual favors, fondling, following plaintiff into women's restroom, and supervisor's exposing himself). Instruction 5.2.1 provides a full instruction if the court wishes to provide guidance on what is a hostile work environment.

The Third Circuit has described the standards for a hostile work environment claim, as applied to sex discrimination, in *Weston v. Pennsylvania*, 251 F.3d 420, 425-426 (3d Cir. 2001):

> Hostile work environment harassment occurs when unwelcome sexual conduct unreasonably interferes with a person's performance or creates an intimidating, hostile, or offensive working environment. . . . In order to be actionable, the harassment must be so severe or pervasive that it alters the conditions of the victim's employment and creates an abusive environment. *Spain v. Gallegos*, 26 F.3d 439, 446-47 (3d Cir.1994).
>
> In *Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993), the Supreme Court clarified the elements of a discrimination claim resulting from a hostile work environment. In order to fall within the purview of Title VII, the conduct in question must be severe and pervasive enough to create an "objectively hostile or abusive work environment--an environment that a reasonable person would find hostile--and an environment the victim-employee subjectively perceives as abusive or hostile." In determining whether an environment is hostile or abusive, we must look at numerous factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance." The Supreme Court recently reaffirmed *Harris'* "severe and pervasive" test in *Faragher v. City of Boca Raton*, 524 U.S. 775, 783 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998).

Title VII protects only against harassment based on discrimination against a protected class. It is not "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998). "Many may suffer severe harassment at work, but if the reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no relief."*Jensen v. Potter*, 435 F.3d 444, 447 (3d Cir. 2006).

Severe or Pervasive Activity

The terms "severe or pervasive" set forth in the instruction are in accord with Supreme Court case law and provide for alternative possibilities for finding harassment. See *Jensen v. Potter*, 435

F.3d 444, 447, n.3 (3d Cir. 2006) ("The disjunctive phrasing means that 'severity' and 'pervasiveness' are alternative possibilities: some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.") (quoting 2 C.Sullivan et. al., *Employment Discrimination Law and Practice* 455 (3d ed. 2002).

Objective and Subjective Components

The Supreme Court in *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." The instruction accordingly sets forth both objective and subjective components.

Affirmative Defense Where Constructive Discharge Is Not Based on an Official Act

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 138-40 (2004), the Court considered the relationship between constructive discharge brought about by supervisor harassment and the affirmative defense articulated in *Ellerth* and *Faragher*. The Court concluded that "an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment." The Court reasoned as follows:

> [W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer. As those leading decisions indicate, official directions and declarations are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control. See *Ellerth*, 524 U.S., at 762. Absent "an official act of the enterprise," ibid., as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force. And as *Ellerth* and *Faragher* further point out, an official act reflected in company records--a demotion or a reduction in compensation, for example--shows "beyond question" that the supervisor has used his managerial or controlling position to the employee's disadvantage. See *Ellerth*, 524 U.S., at 760. Absent such an official act, the extent to which the supervisor's misconduct has been aided by the agency relation . . . is less certain. That uncertainty, our precedent establishes . . . justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable.
>
> . . .
>
> Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. The plaintiff might elect to allege facts relevant to

mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

Hostile Work Environment That Precedes the Plaintiff's Employment

The instruction refers to harassing "conduct" that "was motivated by the fact that [plaintiff] is a [membership in a protected class]." This language is broad enough to cover the situation where the plaintiff is the first member of a protected class to enter the work environment, and the working conditions pre-existed the plaintiff's employment. In this situation, the "conduct" is the refusal to change an environment that is hostile to members of the plaintiff's class. The judge may wish to modify the instruction so that it refers specifically to the failure to correct a pre-existing environment.

Harassment as Retaliation for Protected Activity

In *Jensen v. Potter*, 435 F.3d 444, 446 (3d Cir. 2006), the court held that the retaliation provision of Title VII "can be offended by harassment that is severe or pervasive enough to create a hostile work environment." The *Jensen* court also declared that "our usual hostile work environment framework applies equally to Jensen's claim of retaliatory harassment." But subsequently the Supreme Court in *Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53, 68 (2006), set forth a legal standard for determining retaliation that appears to be less rigorous than the standard for determining a hostile work environment. The Court in *White* declared that a plaintiff has a cause of action for retaliation under Title VII if the employer's actions in response to protected activity "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." After *White*, the Title VII retaliation provision can be offended by any activity of the employer — whether harassment or some other action — that satisfies the *White* standard. See Instruction 5.1.7 for a general instruction on retaliation in Title VII actions.

Back Pay

In *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. "Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue." As ADA damages are coextensive with Title VII damages — see the Comment to Instruction 9.4.1 — the ruling from *Spencer* appears to be applicable to Title VII hostile work environment cases. Thus, back pay will not be available in an action in which Instruction 5.1.5 is given, because the plaintiff has not raised a jury question on a tangible employment action.

5.1.6 Elements of a Title VII Claim — Disparate Impact

No Instruction

Comment

Distinction Between Disparate Impact and Disparate Treatment; *Elements of Disparate Treatment Claim*

The instructions provided in Chapter 5 focus on disparate treatment claims under Title VII – i.e., on claims in which a central question is whether the employer had an intent to discriminate. Title VII claims can alternatively be brought under a disparate impact theory, in which event the plaintiff need not show discriminatory intent. In a disparate impact case, the plaintiff must first present a prima facie case by showing "that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern." *Meditz v. City of Newark*, 658 F.3d 364, 370 (3d Cir. 2011) (quoting *NAACP v. Harrison*, 940 F.2d 792, 798 (3d Cir. 1991) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977))). If the plaintiff does so, "the defendant can overcome the showing of disparate impact by proving a 'manifest relationship' between the policy and job performance." *El v. Southeastern Pennsylvania Transp. Authority*, 479 F.3d 232, 239 (3d Cir. 2007) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)); *see also* 42 U.S.C. § 2000e-2(k) (addressing burdens of proof in disparate impact cases); *NAACP v. North Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 477, 482 (3d Cir. 2011) (discussing and applying business-necessity defense under Section 2000e-2(k)). Even if the defendant proves this business necessity defense, "the plaintiff can overcome it by showing that an alternative policy exists that would serve the employer's legitimate goals as well as the challenged policy with less of a discriminatory effect." *El*, 479 F.3d at 239 n.9.

No instruction is provided on disparate impact claims, because a right to jury trial is not provided under Title VII for such claims. The basic remedies provision of Title VII, 42 U.S.C.A. § 1981a(a)(1), provides as follows:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination *(not an employment practice that is unlawful because of its disparate impact)* prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [or 2000e-16]), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e-5(g)], from the respondent. (emphasis added).

See also Seventh Circuit Pattern Jury Instructions 3.08 (no instruction provided for disparate impact claims under Title VII); *Pollard v. Wawa Food Market*, 366 F.Supp.2d 247, 254 (E.D.Pa. 2005)("Because Pollard proceeds under a disparate impact theory, and not under a theory of intentional discrimination, if successful on her Title VII claim she would be entitled only to equitable

relief. 42 U.S.C. §1981a(a)(1). She therefore is not entitled to a jury trial on that claim.").

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that disparate impact claims are cognizable under the Age Discrimination in Employment Act. The ADEA provides a right to jury trial in such claims. *See* 29 U.S.C. § 626(c)(2) ("[A] person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action."). Where an ADEA disparate impact claim is tried together with a Title VII disparate impact claim, the parties or the court may decide to refer the Title VII claim to the jury. In that case, the instruction provided for ADEA disparate impact claims (see Instruction 8.1.5) can be modified to apply to the Title VII claim. Care must be taken, however, to instruct separately on the Title VII disparate impact claim, as the substantive standards of recovery under Title VII in disparate impact cases are broader than those applicable to the ADEA. See the Comment to Instruction 8.1.5 for a more complete discussion.

5.1.7 Elements of a Title VII Claim — Retaliation

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [describe protected activity].[8]

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [describe activity protected by Title VII].

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe protected activity].

Concerning the first element, [plaintiff] need not prove the merits of [his/her] [describe plaintiff's activity], but only that [he/she] was acting under a good faith belief that [plaintiff's] [or someone else's] right to be free from discrimination on the basis of [protected status] was violated.

Concerning the second element, the term "materially adverse" means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [employer's] action followed shortly after [employer] became aware of [plaintiff's]

[8] Instruction 5.1.7 will often be used in cases in which the same employee engaged in the protected activity and directly suffered the retaliation. As noted in the Comment, Title VII also bars retaliation against another employee if the circumstances are such that the retaliation against that employee might well dissuade a reasonable worker from engaging in protected activity. *See Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011). In cases in which the plaintiff is not the person who engaged in protected activity, the instruction should be modified appropriately. Among such changes, the following language could be added to the paragraph that explains the second element: "That is to say, you must decide if any actions [defendant] took against [plaintiff] might well discourage a reasonable worker in [third party's] position from [describe protected activity]. You must decide that question based on the circumstances of the case. [To take two examples, firing a close family member will almost always meet that test, but inflicting less serious harm on a mere acquaintance will almost never do so.]"

[describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

Comment

Title VII protects employees and former employees who attempt to exercise the rights guaranteed by the Act against retaliation by employers. 42 U.S.C.A. § 2000e-3(a) is the anti-retaliation provision of Title VII, and it provides as follows:

> **§ 2000e-3. Other unlawful employment practices** (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Protected Activities

Activities protected from retaliation under Title VII include the following: 1) opposing any practice made unlawful by Title VII; 2) making a charge of employment discrimination; 3) testifying, assisting or participating in any manner in an investigation, proceeding or hearing under Title VII. Id. *See also Glanzman v. Metropolitan Management Corp.*, 391 F.3d 506 (3d Cir. 2004) (if plaintiff were fired for being a possible witness in an employment discrimination action, this would be unlawful retaliation) (ADEA); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997) (filing EEOC complaint constitutes protected activity), *overruled on other grounds by Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53 (2006); *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (advocating salary increases for women employees, to compensate them equally with males, was protected activity); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) ("protesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct"). The question of whether a particular activity is "protected" from retaliation is a question of law; whether the plaintiff engaged in that activity is a question of fact for the jury. A

plaintiff "need not prove the merits of the underlying discrimination complaint." Id.

Informal complaints and protests can constitute protected activity. "Opposition to discrimination can take the form of informal protests of discriminatory employment practices, including making complaints to management. To determine if retaliation plaintiffs sufficiently opposed discrimination, we look to the message being conveyed rather than the means of conveyance." *Moore v. City of Philadelphia*, 461 F.3d 331, 343 (3d Cir. 2006) (citations omitted).

In *Crawford v. Metropolitan Gov't of Nashville and Davidson Cty., Tennessee*, 129 S. Ct. 846, 851 (2009), the Court held that the antiretaliation provision's "opposition" clause does not require the employee to initiate a complaint. The provision also protects an employee who speaks out about discrimination by answering questions during an employer's internal investigation. The Court declared that there is "no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

In *Slagle v. County of Clarion*, 435 F.3d 262 (3d Cir. 2006), the court held that Title VII does not protect against retaliation for filing a claim that is facially invalid. The employee's claim in *Slagle* was facially invalid because it failed even to allege any conduct that was prohibited by Title VII. In finding the making of that complaint to be unprotected activity, the *Slagle* court noted that Title VII requires "only that the plaintiff file a formal complaint that alleges one or more prohibited grounds in order to be protected under Title VII. But we cannot dispense with the requirement that the plaintiff allege prohibited grounds." 435 F.3d at 267. The court took pains to note, however, that Title VII sets a "low bar" for employees seeking protection from retaliation. It elaborated as follows:

> A plaintiff need only allege discrimination on the basis of race, color, religion, sex, or national origin to be protected from retaliatory discharge under Title VII. Protection is not lost merely because an employee is mistaken on the merits of his or her claim. . . . All that is required is that plaintiff allege in the charge that his or her employer violated Title VII by discriminating against him or her on the basis of race, color, religion, sex, or national origin, in any manner. Slagle did not do so, and therefore he cannot assert a claim for retaliation for filing that charge.

435 F. 3d at 268.

In *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130, 135 (3d Cir. 2006), the court held that general protest on public issues does not constitute protected activity. To be protected under Title VII, the employee's activity must be directed to the employer's alleged illegal employment practice; it must "identify the employer and the practice — if not specifically, at least by context." In *Curay-Cramer*, the plaintiff alleged that her employer retaliated against her after she signed a pro-choice advertisement, thus advocating a position on a public issue that her employer opposed. But because the advertisement did not mention her employer or refer to any employment practice, the plaintiff's actions did not constitute protected activity.

The *Curay-Cramer* court further held that the plaintiff could not elevate her claim by protesting her employer's decision to fire her for signing the advertisement. The court noted that "an employee may not insulate herself from termination by covering herself with the cloak of Title VII's opposition protections *after* committing non-protected conduct that was the basis of the decision to terminate." The court reasoned that "[i]f subsequent conduct could prevent an employer from following up on an earlier decision to terminate, employers would be placed in a judicial straight-jacket not contemplated by Congress."

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations omitted). The Court elaborated on this standard in the following passage:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.
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> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, [Pennsylvania State Police v.] *Suders*, 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.
>
> Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

548 U.S. at 68 (some citations omitted). The instruction follows the guidelines of the Supreme Court's decision in *White*. For applications of the *White* standard, *see Moore v. City of Philadelphia*, 461 F.3d 331, 348 (3d Cir. 2006) (finding that a transfer of a police officer from a district where he had earned goodwill and established good relations with the community could constitute actionable retaliation, because it "is the kind of action that might dissuade a police officer from making or supporting a charge of unlawful discrimination within his squad."); Id. at 352 (aggressive enforcement of sick-check policy "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.").

No Requirement That Retaliation Be Job-Related To Be Actionable

The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 61-62 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation provision from its basic anti-discrimination provision, which does require an adverse employment action.

> The language of the substantive provision differs from that of the anti-retaliation provision in important ways. Section 703(a) sets forth Title VII's core anti-discrimination provision in the following terms:
>
> "It shall be an unlawful employment practice for an employer --
>
> "(1) *to fail or refuse to hire or to discharge* any individual, or otherwise to

> discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex, or national origin." § 2000e-2(a) (emphasis added).

Section 704(a) sets forth Title VII's anti-retaliation provision in the following terms:

> "It shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." § 2000e-3(a) (emphasis added).

The underscored words in the substantive provision -- "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" -- explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision. Given these linguistic differences, the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing.

The *White* Court explained the rationale for providing broader protection in the retaliation provision than is provided in the basic discrimination provision of Title VII:

> There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800-801, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.
>
> To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. The substantive provision's basic objective of "equality of employment opportunities" and the elimination of practices that tend to bring about "stratified job environments," *id.*, at 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668, would be achieved were all employment-related discrimination miraculously eliminated.

> But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. See, *e.g.*, *Rochon* v. *Gonzales*, 438 F.3d at 1213 (FBI retaliation against employee "took the form of the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] and his wife"); *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (CA10 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination). A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "maintaining unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

548 U.S. at 63-64 (emphasis in original)

Accordingly, the instruction contains bracketed material to cover a plaintiff's claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995) (requiring the plaintiff in a retaliation case to prove among other things that "the employer took an adverse employment action against her"). *See also Moore v. City of Philadelphia,* 461 F.3d 331, 341 (3d Cir. 2006) (observing that the *White* decision rejected Third Circuit law that limited recovery for retaliation to those actions that altered the employee's compensation or terms and conditions of employment).

Membership In Protected Class Not Required

An employee need not be a member of a protected class to be subject to actionable retaliation under Title VII. For example, a white employee who complains about discrimination against black employees, and is subject to retaliation for those complaints, is protected by the Title VII anti-retaliation provision. *See Moore v. City of Philadelphia, 461* F.3d 331, 342 (3d Cir. 2006) ("Title VII's whistleblower protection is not limited to those who blow the whistle on their own mistreatment or on the mistreatment of their own race, sex, or other protected class.")

Claim by victim of retaliation for another's protected activity

Title VII not only bars retaliation against the employee who engaged in the protected activity; it also bars retaliation against another employee if the circumstances are such that the retaliation against that employee might well dissuade a reasonable worker from engaging in protected activity. *See Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 868 (2011) ("We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."). The *Thompson* Court stressed that analysis of a claim of third-party

retaliation is fact-specific. *See id.* ("We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.").

In order to bring a retaliation claim under Title VII, the third-party victim of the retaliation must show that he or she "falls within the zone of interests protected by Title VII." *Id.* at 870. In *Thompson*, the plaintiff fell "well within the zone of interests sought to be protected by Title VII" because he was an employee of the defendant and because "injuring him was the employer's intended means of harming" his fiancée, who had engaged in the protected activity that triggered the retaliation. *See id.*

The *Thompson* Court did not specify whether the questions noted in the two preceding paragraphs should be decided by the judge or the jury. In keeping with existing practice, it seems likely that it is for the jury to determine whether, under the circumstances, retaliation against the third party might well dissuade a reasonable worker from engaging in protected activity. By contrast, it may be for the judge rather than the jury to determine whether the third party falls within the zone of interests protected by Title VII. Bracketed options in Instruction 5.1.7 reflect these considerations.

Causation

For a helpful discussion on the importance of the time period between the plaintiff's protected activity and the action challenged as retaliatory, as well as other factors that might be relevant to a finding of causation, *see Marra v. Philadelphia Housing Authority*, 497 F.3d 286, 302 (3d Cir. 2007) (a case involving a claim of retaliation under the Pennsylvania Human Relations Act, which the court found to be subject to the same standards of substantive law as an action for retaliation under Title VII) :

> We have recognized that.a plaintiff may rely on a "broad array of evidence" to demonstrate a causal link between his protected activity and the adverse action taken against him. *Farrell* [v. Planters Lifesavers Co., 206 F.3d 271, 284 (3d Cir. 2000)]. In certain narrow circumstances, an "unusually suggestive" proximity in time between the protected activity and the adverse action may be sufficient, on its own, to establish the requisite causal connection. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997); see *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989) (discharge of plaintiff two days after filing EEOC complaint found to be sufficient, under the circumstances, to establish causation). Conversely, however, "[t]he mere passage of time is not legally conclusive proof against retaliation." *Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d 892, 894 (3d Cir. 1993) (citation omitted); see also *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178 (3d Cir. 1997) ("It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn."). Where the time between the protected activity and adverse action is not so close as to be unusually suggestive of a causal connection standing alone, courts may look to the intervening period for demonstrative proof, such as actual antagonistic conduct or animus against the employee, *see, e.g., Woodson* [v.

Scott Paper Co., 109 F.3d 913, 921 (3d Cir. 1997)] (finding sufficient causal connection based on "pattern of antagonism" during intervening two-year period between protected activity and adverse action), or other types of circumstantial evidence, such as inconsistent reasons given by the employer for terminating the employee or the employer's treatment of other employees, that give rise to an inference of causation when considered as a whole. *Farrell*, 206 F.3d at 280-81.

The *Marra* court noted that the time period relevant to causation is that between the date of the employee's protected activity and the date on which the employer made the decision to take adverse action. In *Marra* the employer made the decision to terminate the plaintiff five months after the protected activity, but the employee was not officially terminated until several months later. The court held that the relevant time period ran to when the decision to terminate was made. 497 F.3d at 286.

The *Marra* court also emphasized that in assessing causation, the cumulative effect of the employer's conduct must be evaluated: "it matters not whether each piece of evidence of antagonistic conduct is alone sufficient to support an inference of causation, so long as the evidence permits such an inference when considered collectively." 497 F.3d at 303.

For other Third Circuit cases evaluating the causative connection between protected activity and an adverse employment decision, *see Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006) (noting that temporal proximity and a pattern of antagonism "are not the exclusive ways to show causation" and that the element of causation in retaliation cases "is highly context-specific"); *Moore v. City of Philadelphia*, 461 F.3d 331, 352 (3d Cir. 2006) (employee was subject to three sick-checks in his first five months of medical leave; after filing a lawsuit alleging discrimination, he was subject to sick-checks every other day; the "striking difference" in the application of the sick-check policy "would support an inference that the more aggressive enforcement "was caused by retaliatory animus."); *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 233 (3d Cir. 2007) ("Although there is no bright line rule as to what constitutes unduly suggestive temporal proximity, a gap of three months between the protected activity and the adverse action, without more, cannot create an inference of causation and defeat summary judgment.").

In appropriate cases, it may be useful to note that if the jury disbelieves the employer's proffered non-retaliatory reason for the employment decision, it may consider that fact in determining whether the defendant's proffered reason was really a cover-up for retaliation. *Cf., e.g.*, *Moore*, 461 F.3d at 342, 346 (applying the *McDonnell Douglas* framework to a Title VII retaliation claim and analyzing, inter alia, whether "the plaintiffs tendered sufficient evidence to overcome the non-retaliatory explanation offered by their employer"). If the court wishes to modify Instruction 5.1.7 in this manner, it could adapt the penultimate paragraph of Instruction 5.1.2 by substituting references to retaliation for references to discrimination:

> [Defendant] has given a nonretaliatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved retaliation. In determining whether [defendant's] stated

reason for its actions was a pretext, or excuse, for retaliation, you may not question [defendant's] business judgment. You cannot find retaliation simply because you disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for retaliation.

Animus of Employee Who Was Not the Ultimate Decisionmaker

Construing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Supreme Court ruled that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA" even if the ultimate employment decision is taken by one other than the supervisor with the animus. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (footnotes omitted). The Court did not explicitly state whether this ruling extends to Title VII discrimination claims under 42 U.S.C. § 2000e-2(m) (which also refers to discrimination as a motivating factor), though it noted the similarity between Section 2000e-2(m)'s language and that of the USERRA. Unlike Title VII discrimination claims under 42 U.S.C. § 2000e-2(m), Title VII retaliation claims are not founded on any explicit statutory reference to discrimination as "a motivating factor." Because the Court's analysis in *Staub* was framed as an interpretation of the statutory language in the USERRA, it was initially unclear whether *Staub*'s holding extends to Title VII retaliation claims. However, the Court of Appeals, in *McKenna v. City of Philadelphia*, 649 F.3d 171 (3d Cir. 2011), treated *Staub* as applicable to the plaintiff's Title VII retaliation claim. *See McKenna*, 649 F.3d at 180 (holding that "under *Staub*, the District Court did not err in denying the City's motion for judgment as a matter of law/notwithstanding the verdict"); *id.* (concluding that though the jury instructions – given prior to the decision in *Staub* – "did not precisely hew to the proximate cause language adopted in *Staub*, ... the variation was harmless"). Thus, in a case involving retaliatory animus by one other than the ultimate decisionmaker, Instruction 5.1.7 should be modified to reflect *McKenna*'s application of *Staub*.

Retaliation Against Perceived Protected Activity

In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 562 (3d Cir. 2002), an ADA case, the court declared that the retaliation provision in Title VII protected an employee against retaliation for "perceived" protected activity. "Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable." 283 F.3d at 562. For the fairly unusual case in which the employer is alleged to have retaliated for perceived rather than actual protected activity, the instruction can be modified consistently with the court's directive in *Fogleman.*

Determinative Effect

Instruction 5.1.7 requires the plaintiff to show that the plaintiff's protected activity had a

"determinative effect" on the allegedly retaliatory activity. This is the standard typically used in Title VII pretext cases outside the context of retaliation. *See* Comment 5.1.2. Title VII claims that do not involve retaliation can alternatively proceed on a mixed-motive theory subject to the affirmative defense stated in 42 U.S.C. § 2000e-5(g)(2)(B), *see* Comment 5.1.1, but Section 2000e-5(g)(2)(B)'s framework does not apply to Title VII retaliation claims, *see Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997).

However, a distinction between pretext and mixed-motive cases has been recognized as relevant for both Title VII retaliation claims and ADA retaliation claims: "[W]e analyze ADA retaliation claims under the same framework we employ for retaliation claims arising under Title VII.... This framework will vary depending on whether the suit is characterized as a 'pretext' suit or a 'mixed motives' suit." *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997). For Title VII retaliation claims that proceed on a "pretext" theory, the "determinative effect" standard applies. *See Woodson*, 109 F.3d at 935 (holding that it was error, in a case that proceeded on a "pretext" theory, not to use the "determinative effect" language). The court of appeals has indicated that the *Price Waterhouse* mixed-motive standard can be appropriate in Title VII retaliation cases if warranted by the evidence. *See Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 516 (3d Cir. 1997) (concluding after careful analysis of the evidence "that the district court did not err in charging the jury with a pretext instruction because the plaintiffs did not produce sufficient 'direct' evidence of retaliatory animus to require a mixed motives burden shifting charge").[9]

In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The Gross Court reasoned that it had never held that the *Price Waterhouse* mixed-motive framework applied to ADEA claims; that the ADEA's reference to discrimination "because of" age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at Section 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims. The Committee has not attempted to determine what, if any, implications *Gross* has for Title VII retaliation claims, but the Committee suggests that users of these instructions should consider that question.

[9] The *Walden* court's analysis of *what kind of evidence* is required to warrant a mixed-motive framework may no longer be entirely current. *See* Comment 5.1.1 (discussing treatment of analogous question concerning statutory burden-shifting framework in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003)).

5.2.1 Title VII Definitions — Hostile or Abusive Work Environment

Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

- The total physical environment of [plaintiff's] work area.
- The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.
- The reasonable expectations of [plaintiff] upon entering the environment.
- The frequency of the offensive conduct.
- The severity of the conduct.
- The effect of the working environment on [plaintiff's] mental and emotional well-being.
- Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.
- Whether the conduct was pervasive.
- Whether the conduct was directed toward [plaintiff].
- Whether the conduct was physically threatening or humiliating.
- Whether the conduct was merely a tasteless remark.
- Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [plaintiff's membership in a protected class]. The harassing conduct may, but need not be [sexual/racial, etc.] in nature. Rather, its defining characteristic is that the harassment complained of is linked to the victim's [protected status]. The key question is whether [plaintiff], as a

[member of protected class], was subjected to harsh employment conditions to which [those outside the protected class] were not.

It is important to understand that, in determining whether a hostile work environment existed at the [employer's workplace] you must consider the evidence from the perspective of a reasonable [member of protected class] in the same position. That is, you must determine whether a reasonable [member of protected class] would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological or emotional well-being of a reasonable [member of protected class]. The reasonable [member of protected class] is simply one of normal sensitivity and emotional make-up.

Comment

This instruction can be used to provide the jury more guidance for determining whether a hostile work environment exists in a claim for harassment under Title VII. See Instructions 5.1.4 and 5.1.5 for instructions on harassment claims.

In *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 25 (3d Cir. 1997), the Third Circuit set forth the following requirements for proving a hostile work environment claim in a sex discrimination case under Title VII:

> (1) the employee suffered intentional discrimination because of [his or her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.

Instruction 5.2.1 is similar to the instruction approved (with respect to claims under the New Jersey Law Against Discrimination) in *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 115-17 (3d Cir. 1999).

The Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.75, 80 (1998), noted that an employer is not liable under Title VII for a workplace environment that is harsh for all employees; generalized harassment is not prohibited by Title VII. *See also Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006) ("Many may suffer severe harassment at work, but if the reason for that harassment is one that is not prescribed by Title VII, it follows that Title VII provides no relief.")

The pattern instruction follows *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998), in which the Court stated that "isolated incidents (unless extremely serious) will not amount to discriminatory changes of the terms and conditions of employment."

5.2.2 Title VII Definitions — Constructive Discharge

Model

In this case, to show that [he/she] was subjected to an adverse "tangible employment action," [plaintiff] claims that [he/she] was forced to resign due to [name's] discriminatory conduct. Such a forced resignation, if proven, is called a "constructive discharge." To prove that [he/she] was subjected to a constructive discharge, [plaintiff] must prove that working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.

Comment

This instruction can be used when the plaintiff was not fired, but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for integration into either Instruction 5.1.3 (with respect to the instruction's fourth element) or Instruction 5.1.4 (with respect to the instruction's sixth element). If, instead, the plaintiff claims that she was constructively discharged based on a supervisor's or co-worker's adverse action or actions that were not sanctioned by the employer, the constructive discharge would not count as a tangible adverse employment action (for the purposes of determining whether the employer may assert an *Ellerth / Faragher* affirmative defense). *See* Comment 5.1.5. *See also Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) ("[A]n employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment.").

In *Suders*, the Court explained that "[u]nder the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *See also Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159 (3d Cir. 1993) (ADEA claim) (close supervision of the employee was not enough to constitute a constructive discharge).

5.3.1 Title VII Defenses — Bona Fide Occupational Qualification

Model

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [his/her] [protected status], then you must consider [defendant's] defense that its action was based on a bona fide occupational qualification.

To avoid liability for intentional discrimination on the basis of this contention, [defendant] must prove both of the following elements by a preponderance of the evidence:

First: The occupational qualification relied upon by [defendant] is reasonably necessary for the normal operation of [defendant's] business.

Second: [Defendant] either had reasonable cause to believe that all or substantially all persons [in the protected class] would be unable to perform the job safely and efficiently, or that it was impossible or highly impractical to consider the necessary qualifications of each [person in the protected class]. [Defendant's] belief should be evaluated in light of all the circumstances in the case, to determine whether it has a reasonable basis in fact.

If you find that [defendant] has proved these two elements by a preponderance of the evidence, then you must find for [defendant].

Comment

In some cases, an employer may defend a disparate treatment claim by proving that the discriminatory treatment is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular enterprise. 42 U.S.C.A. § 2000e-2(e)(1) provides as follows:

> (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...

See, e.g., United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (sex was not BFOQ where employer adopted policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding OSHA

standards); *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (gender was BFOQ for correctional counselor position where sex offenders were scattered throughout prison's facilities). The *Johnson Controls* Court held that the burden of persuasion in establishing the BFOQ defense rests with the defendant. 499 U.S. at 200.

Under Title VII, a BFOQ may relate only to religion, sex or national origin. 42 U.S.C.A. § 2000e-2(e)(1). There is no BFOQ defense in racial discrimination cases. 42 U.S.C.A. § 2000e-2(e)(1). *See Ferrill v. Parker Group*, 168 F.3d 468, 475 (11th Cir.1999) (no BFOQ defense to race-matched telemarketing or polling).

The Third Circuit, in *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996), analyzed the BFOQ defense, in the context of a gender discrimination case, as follows:

> Under the BFOQ defense, overt gender-based discrimination can be countenanced if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise [.]" 42 U.S.C. § 2000e-2(e)(1). The BFOQ defense is written narrowly, and the Supreme Court has read it narrowly. See *Johnson Controls*, 499 U.S. at 201. The Supreme Court has interpreted this provision to mean that discrimination is permissible only if those aspects of a job that allegedly require discrimination fall within the " 'essence' of the particular business." Id. at 206. Alternatively, the Supreme Court has stated that sex discrimination "is valid only when the essence of the business operation would be undermined" if the business eliminated its discriminatory policy. *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977).
>
> The employer has the burden of establishing the BFOQ defense. *Johnson Controls*, 499 U.S. at 200. The employer must have a "basis in fact" for its belief that no members of one sex could perform the job in question. *Dothard*, 433 U.S. at 335. However, appraisals need not be based on objective, empirical evidence, and common sense and deference to experts in the field may be used. See id. (relying on expert testimony, not statistical evidence, to determine BFOQ defense); *Torres v. Wisconsin Dep't Health and Social Servs.*, 859 F.2d 1523, 1531-32 (7th Cir.1988) (in establishing a BFOQ defense, defendants need not produce objective evidence, but rather employer's action should be evaluated on basis of totality of circumstances as contained in the record). The employer must also demonstrate that it "could not reasonably arrange job responsibilities in a way to minimize a clash between the privacy interests of the [patients], and the non-discriminatory principle of Title VII." *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.1980).

See also *Lanning v. SEPTA*, 181 F.3d 478, 500 (3d Cir. 1999) (under the defense of bona fide occupational qualification, "'the greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications....'", quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)).

5.3.2 Title VII Defenses — Bona Fide Seniority System

No Instruction

Comment

In contrast to a bona fide occupational qualification, which is an affirmative defense, the treatment of an employer's alleged bona fide seniority system is simply one aspect of the plaintiff's burden of proving intentional discrimination in a Title VII case.[10] In *Lorance v. AT & T Technologies, Inc*., 490 U.S. 900, 908-09 (1989), *superseded by statute on other grounds*, Pub. L. No. 102-166, Title I, § 112, 105 Stat. 1079, codified as amended at 42 U.S.C. § 2000e-5(e)(2), the Court emphasized that the plaintiff has the burden of proving intentional discrimination and held that, as applied to seniority systems, the plaintiff must prove that the seniority system is a means of intentional discrimination. Thus the existence of a bona fide seniority system is not an affirmative defense; rather it is simply an aspect of the plaintiff's burden of proving discrimination. The *Lorance* Court specifically distinguished seniority systems from bona fide occupational qualifications, a defense on which the defendant does have the burden. *See also Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1417 (3d Cir. 1991) (stating that petitioning employees "were required to allege that either the creation or the operation of the seniority system was the result of intentional discrimination"); *Green v. USX Corp.*, 896 F.2d 801, 806 (3d Cir. 1990) (noting that proof of disparate treatment, not simply disparate impact, is required to invalidate a seniority system under Title VII). Accordingly, no instruction is included for any affirmative defense for a bona fide seniority system.

[10] *See* 42 U.S.C. § 2000e-2(h); *see also AT & T Corp. v. Hulteen*, 129 S. Ct. 1962, 1973 (2009) (applying § 2000e-2(h)).

5.4.1 Title VII Damages — Compensatory Damages — General Instruction

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find by a preponderance of the evidence that [defendant] intentionally discriminated against [plaintiff] by [describe conduct], then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. [Plaintiff] must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. This test — a substantial part in bringing about the injury — is to be distinguished from the test you must employ in determining whether [defendant's] actions [or omissions] were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for an injury unless [defendant's] discriminatory actions [or omissions] actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] act [or omission] caused [plaintiff's] injury, you need not find that [defendant's] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experienced as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial.

I instruct you that in awarding compensatory damages, you are not to award damages for the amount of wages that [plaintiff] would have earned, either in the past or in the future, if [he/she] had continued in employment with [defendant]. These elements of recovery of wages that [plaintiff] would have received from [defendant] are called “back pay” and “front pay”. [Under the applicable law, the determination of “back pay” and “front pay” is for the court.] [“Back pay” and “front pay” are to be awarded separately under instructions that I will soon give you, and any amounts for “back pay”and “front pay” are to be entered separately on the verdict form.]

You may award damages for monetary losses that [plaintiff] may suffer in the future as a result of [defendant’s] [allegedly unlawful act or omission]. [For example, you may award damages for loss of earnings resulting from any harm to [plaintiff’s] reputation that was suffered as a result of [defendant’s] [allegedly unlawful act or omission]. Where a victim of discrimination has been terminated by an employer, and has sued that employer for discrimination, [he/she] may find it more difficult to be employed in the future, or may have to take a job that pays less than if the discrimination had not occurred. That element of damages is distinct from the amount of wages [plaintiff] would have earned in the future from [defendant] if [he/she] had retained the job.]

As I instructed you previously, [plaintiff] has the burden of proving damages by a preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of [his/her] losses with mathematical precision; it requires only as much definiteness and accuracy as circumstances permit.

[You are instructed that [plaintiff] has a duty under the law to "mitigate" [his/her] damages--that means that [plaintiff] must take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage caused by [defendant]. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was reasonably available to [him/her], then you must reduce the amount of [plaintiff’s] damages by the amount that could have been reasonably obtained if [he/she] had taken advantage of such an opportunity.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

Title VII distinguishes between disparate treatment and disparate impact discrimination and allows recovery of compensatory damages only to those who suffered intentional discrimination. 42 U.S.C.A. § 1981a(a)(1).

Cap on Damages

The Civil Rights Act of 1991 (42 U.S.C. § 1981a) provides for compensatory damages and a right to jury trial for disparate treatment violations. But it also imposes a statutory limit on the amount of compensatory damages that can be awarded. See 42 U.S.C. § 1981a(b)(3):

> **Limitations**. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $ 300,000.

42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations on recovery of compensatory damages.

No Right to Jury Trial for Back Pay and Front Pay

Back pay and front pay are equitable remedies that are to be distinguished from the compensatory damages to be determined by the jury under Title VII. See the Comments to Instructions 5.4.3 & 5.4.4. Compensatory damages may include lost future earnings over and above the front pay award. For example, the plaintiff may recover the diminution in expected earnings in all future jobs due to reputational or other injuries, above any front pay award. The court in *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953-54 (7th Cir. 1998), described the difference between the equitable remedy of front pay and compensatory damages for loss of future earnings in the following passage:

> Front pay in this case compensated Williams for the immediate effects of Pharmacia's unlawful termination of her employment. The front pay award approximated the benefit Williams would have received had she been able to return to her old job. The district court appropriately limited the duration of Williams's front pay award to one year because she would have lost her position by that time in any event because of the merger with Upjohn.
>
> The lost future earnings award, in contrast, compensates Williams for a lifetime of diminished earnings resulting from the reputational harms she suffered as a result of

Pharmacia's discrimination. Even if reinstatement had been feasible in this case, Williams would still have been entitled to compensation for her lost future earnings. As the district court explained:

> Reinstatement (and therefore front pay) . . . does not and cannot erase that the victim of discrimination has been terminated by an employer, has sued that employer for discrimination, and the subsequent decrease in the employee's attractiveness to other employers into the future, leading to further loss in time or level of experience. Reinstatement does not revise an employee's resume or erase all forward-looking aspects of the injury caused by the discriminatory conduct.
>
> A reinstated employee whose reputation and future prospects have been damaged may be effectively locked in to his or her current employer. Such an employee cannot change jobs readily to pursue higher wages and is more likely to remain unemployed if the current employer goes out of business or subsequently terminates the employee for legitimate reasons. These effects of discrimination diminish the employee's lifetime expected earnings. Even if Williams had been able to return to her old job, the jury could find that Williams suffered injury to her future earning capacity even during her period of reinstatement. Thus, there is no overlap between the lost future earnings award and the front pay award.

The *Williams* court emphasized the importance of distinguishing front pay from lost future earnings, in order to avoid double-counting.

> [T]he calculation of front pay differs significantly from the calculation of lost future earnings. Whereas front pay compensates the plaintiff for the lost earnings from her old job for as long as she may have been expected to hold it, a lost future earnings award compensates the plaintiff for the diminution in expected earnings in all of her future jobs for as long as the reputational or other injury may be expected to affect her prospects. . . . [W]e caution lower courts to take care to separate the equitable remedy of front pay from the compensatory remedy of lost future earnings. . . . Properly understood, the two types of damages compensate for different injuries and require the court to make different kinds of calculations and factual findings. District courts should be vigilant to ensure that their damage inquiries are appropriately cabined to protect against confusion and potential overcompensation of plaintiffs.

The pattern instruction contains bracketed material that would instruct the jury not to award back pay or front pay. The jury may, however, enter an award of back pay and front pay as advisory, or by consent of the parties. In those circumstances, the court should refer to instructions 5.4.3 for back pay and 5.4.4 for front pay. In many cases it is commonplace for back pay issues to be submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or are to be left to the court's determination without reference to the jury.*Damages for Pain and Suffering*

In *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir. 1988), the Court held

that under 42 U.S.C. § 1981 and Title VII, a plaintiff cannot recover pain and suffering damages without first presenting evidence of actual injury. The court stated that "[t]he justifications that support presumed damages in defamation cases do not apply in § 1981 and Title VII cases. Damages do not follow of course in § 1981 and Title VII cases and are easier to prove when they do."

Attorney Fees and Costs

There appears to be no uniform practice regarding the use of an instruction that warns the jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction, and, reviewing for plain error, found none: "We need not and do not decide now whether a district court commits error by informing a jury about the availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable that a jury tasked with computing damages might, absent information that the Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step of returning a verdict against him even though it believed he was the victim of age discrimination, notwithstanding the District Court's clear instructions to the contrary." *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

5.4.2 Title VII Damages — Punitive Damages

Model

[Plaintiff] claims the acts of [defendant] were done with malice or reckless indifference to [plaintiff's] federally protected rights and that as a result there should be an award of what are called "punitive" damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury, and so receives nominal rather than compensatory damages.]

An award of punitive damages is permissible in this case only if you find by a preponderance of the evidence that a management official of [defendant] personally acted with malice or reckless indifference to [plaintiff's] federally protected rights. An action is with malice if a person knows that it violates the federal law prohibiting discrimination and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

[For use where the defendant raises a jury question on good-faith attempt to comply with the law:

But even if you make a finding that there has been an act of discrimination with malice or reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant] proves by a preponderance of the evidence that it made a good-faith attempt to comply with the law, by adopting policies and procedures designed to prevent unlawful discrimination such as that suffered by [plaintiff].**]**

An award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied [and that [defendant] has not proved that it made a good-faith attempt to comply with the law], then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion.

If you have found the elements permitting punitive damages, as discussed in this instruction, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish [defendant]. You should also consider whether actual damages standing alone are sufficient to deter or prevent [defendant] from again performing any wrongful acts it may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter others from performing wrongful acts similar to those [defendant] may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the

amount of punitive damages, you should consider the degree to which [defendant] should be punished for its wrongful conduct, and the degree to which an award of one sum or another will deter [defendant] or others from committing similar wrongful acts in the future.

[The extent to which a particular amount of money will adequately punish a defendant, and the extent to which a particular amount will adequately deter or prevent future misconduct, may depend upon the defendant's financial resources. Therefore, if you find that punitive damages should be awarded against [defendant], you may consider the financial resources of [defendant] in fixing the amount of those damages.]

Comment

42 U.S.C.A. § 1981a(b)(1) provides that "[a] complaining party may recover punitive damages under this section [Title VII] against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Punitive damages are available only in cases of intentional discrimination, i.e., cases that do not rely on the disparate impact theory of discrimination.

In *Kolstad v. American Dental Association*, 527 U.S. 526, 534-35 (1999), the Supreme Court held that plaintiffs are not required to show egregious or outrageous discrimination in order to recover punitive damages under Title VII. The Court read 42 U.S.C.A. § 1981a to mean, however, that proof of intentional discrimination is not enough in itself to justify an award of punitive damages, because the statute suggests a congressional intent to authorize punitive awards "in only a subset of cases involving intentional discrimination." Therefore, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Kolstad*, 527 U.S. at 536. The Court further held that an employer may be held liable for a punitive damage award for the intentionally discriminatory conduct of its employee only if the employee served the employer in a managerial capacity and committed the intentional discrimination at issue while acting in the scope of employment, and the employer did not engage in good faith efforts to comply with federal law. *Kolstad*, 527 U.S. at 545-46. In determining whether an employee is in a managerial capacity, a court should review the type of authority that the employer has given to the employee and the amount of discretion that the employee has in what is done and how it is accomplished. Id., 527 U.S. at 543.

Affirmative Defense to Punitive Damages for Good-Faith Attempt to Comply With the Law

The Court in *Kolstad* established an employer's good faith as a defense to punitive damages, but it did not specify whether it was an affirmative defense or an element of the plaintiff's proof for punitive damages. The instruction sets out the employer's good faith attempt to comply with anti-discrimination law as an affirmative defense. The issue has not yet been decided in the Third Circuit,

but the weight of authority in the other circuits establishes that the defendant has the burden of showing a good-faith attempt to comply with laws prohibiting discrimination. *See Medcalf v. Trustees of University of Pennsylvania,* 71 Fed. Appx. 924, 933 n.3 (3d Cir. 2003) (noting that "the Third Circuit has not addressed the issue of whether the good faith compliance standard set out in *Kolstad* is an affirmative defense for which the defendant bears the burden of proof, or whether the plaintiff must disprove the defendant's good faith compliance with Title VII by a preponderance of the evidence"; but also noting that "[a] number of other circuits have determined that the defense is an affirmative one"); *Romano v. U-Haul Int'l,* 233 F.3d 655, 670 (1st Cir. 2000) ("The defendant . . . is responsible for showing good faith efforts to comply with the requirements of Title VII"); *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001) (referring to the defense as an affirmative defense that "requires an employer to establish both that it had an antidiscrimination policy and made good faith effort to enforce it"); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858-59 (7th Cir. 2001) ("Even if the plaintiff establishes that the employer's managerial agents recklessly disregarded his federally protected rights while acting within the scope of their employment, the employer may avoid liability for punitive damages if it can show that it engaged in good faith efforts to implement an antidiscrimination policy."); *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 931 (8th Cir. 2004) ("A corporation may avoid punitive damages by showing that it made good faith efforts to comply with Title VII after the discriminatory conduct."); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000) (under *Kolstad*, defendants may "establish an affirmative defense to punitive damages liability when they have a bona fide policy against discrimination, regardless of whether or not the prohibited activity engaged in by their managerial employees involved a tangible employment action."); *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1208 (10th Cir. 2002) (under *Kolstad*, "even if the plaintiff establishes that the employer's managerial employees recklessly disregarded federally-protected rights while acting within the scope of employment, punitive damages will not be awarded if the employer shows that it engaged in good faith efforts to comply with Title VII.").

Caps on Punitive Damages

Punitive damages are subject to caps in Title VII actions. See 42 U.S.C. § 1981a(b)(3). But 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations on recovery of punitive damages.

Due Process Limitations

The Supreme Court has imposed some due process limits on both the size of punitive damages awards and the process by which those awards are determined and reviewed. In performing the substantive due process review of the size of punitive awards, a court must consider three factors: "the degree of reprehensibility of" the defendant's conduct; "the disparity between the harm or potential harm suffered by" the plaintiff and the punitive award; and the difference between the punitive award "and the civil penalties authorized or imposed in comparable cases." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

For a complete discussion of the applicability of the *Gore* factors to a jury instruction on

punitive damages, see the Comment to Instruction 4.8.3.

5.4.3 Title VII Damages – Back Pay— For Advisory or Stipulated Jury

Model

If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff], then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You may award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff] not been the subject of [defendant's] intentional discrimination.

[*[Alternative One – for use when plaintiff does not seek back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period:]* Back pay damages, if any, apply from the time [plaintiff] was [describe employment action] until the date of your verdict. [However, federal law limits a plaintiff's recovery for back pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal Employment Opportunity Commission. Therefore the back pay award in this case must be determined only for the period between [specify dates]].**]**

[*[Alternative Two – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period but starting two years or less before the filing of the charge:]* In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period but two years or less before the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [prior date] until the date of your verdict. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.**]**

[*[Alternative Three – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period based on an act more than two years before the filing of the charge:]* In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe

employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period and more than two years before the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [date two years prior to filing date of charge (hereafter "two-year date")] until the date of your verdict. In that case, back pay applies from [two-year date] rather than [prior date] because federal law limits a plaintiff's recovery for back pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal Employment Opportunity Commission. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.**]**

You must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award back pay, you are instructed to deduct from the back pay figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of back pay.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-

discovered evidence], you must limit any award of back pay to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information. **]**

Comment

Title VII authorizes a back pay award as a remedy for intentional discrimination. 42 U.S.C. § 2000e-5(g)(1). See *Loeffler v. Frank*, 486 U.S. 549, 558 (1988) (the back pay award authorized by Title VII "is a manifestation of Congress' intent to make persons whole for injuries suffered through past discrimination."). Title VII provides a presumption in favor of a back pay award once liability has been found. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Back Pay Is an Equitable Remedy

An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim for back pay. *See* 42 U.S.C. §1981a(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e5(g)]."); 42 U.S.C. § 2000e-5(g)(1) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . *or any other* equitable relief as the court deems appropriate) (emphasis added). *See also Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 78 n.1 (3d Cir. 2009) (explaining in Title VII case that "back pay and front pay are equitable remedies to be determined by the court"); *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 316 (3d Cir. 2006) (relying on the statutory language of Title VII, which applies to damages recovery under the ADA, the court holds in an ADA action that "back pay remains an equitable remedy to be awarded within the discretion of the court"); *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (noting that front pay and back pay are equitable remedies not subject to the Title VII cap on compensatory damages).

An instruction on back pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may agree to a jury determination on back pay, in which case this instruction would also be appropriate. In many cases it is commonplace for back pay issues to be submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or are to be left to the court's determination without reference to the jury. Instruction 5.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

Computation of Back Pay

The appropriate standard for measuring a back pay award under Title VII is "to take the difference between the actual wages earned and the wages the individual would have earned in the position that, but for discrimination, the individual would have attained." *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1119-20 (3d Cir. 1988). For a discussion of the limits on use of lay witness testimony to establish back pay and front pay calculations, see *Donlin*, 581 F.3d at 81-83. For a discussion of the use of comparators to establish what the plaintiff would have earned as an employee of the defendant, see *id.* at 90.

42 U.S.C. § 2000e-5(g)(1) provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." The court of appeals has explained that "[t]his constitutes a limit on liability, not a statute of limitations, and has been interpreted as a cap on the amount of back pay that may be awarded under Title VII." *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1989). The *Bereda* court held that it was plain error to fail to instruct the jury on an analogous cap under Pennsylvania law (which set the relevant limit under the circumstances of the case). *See id.* Accordingly, when the facts of the case make Section 2000e-5's cap relevant, the court should instruct the jury on it.

Section 2000e-5's current framework for computing a back pay award for Title VII pay discrimination claims reflects Congress's response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). Ledbetter asserted a Title VII pay discrimination claim; specifically, she claimed that she received disparate pay during the charge filing period as a result of intentional discrimination in pay decisions prior to the charge filing period. A closely divided Court held this claim untimely: "A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 628. Finding, inter alia, that the *Ledbetter* decision "significantly impairs statutory protections against discrimination in compensation .... by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress," and that the decision "ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended," Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 (LLFPA). Pub. L. No. 111-2, § 2, January 29, 2009, 123 Stat. 5. The LLFPA added the following provisions to 42 U.S.C. § 2000e-5(e):

> (3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

Under this framework, the specific instructions on back pay calculation will vary depending on (a) whether the plaintiff asserts a pay-discrimination claim;[11] (b) if so, whether the plaintiff asserts not only an unlawful act within the charge filing period but also a similar or related unlawful action prior to the charge filing period; and (c) if so, whether the similar or related prior action fell more than two years prior to the filing of the charge.

Alternative One in the model instruction is suggested for use when the plaintiff does not seek back pay from periods earlier than the date of the unlawful employment practice that provides the basis for the plaintiff's claim.[12] Alternative Two in the model is suggested for use when the plaintiff alleges pay discrimination and seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period but starting two years or less before the filing of the charge; in that situation, the two-year limit need not be mentioned. Alternative Three in the model is suggested for use when the plaintiff alleges pay discrimination and seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period based on an act more than two years before the filing of the charge.

In *Craig v. Y & Y Snacks, Inc*., 721 F.2d 77, 82 (3d Cir. 1983), the court held that unemployment benefits should not be deducted from a Title VII back pay award. That holding is reflected in the instruction.

Mitigation

On the question of mitigation that would reduce an award of back pay, see *Booker v. Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir.1995):

A successful claimant's duty to mitigate damages is found in Title VII: "Interim earnings or amounts earnable with reasonable diligence by the person or persons

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[11] *See Noel v. Boeing Co.*, 2010 WL 3817090, at *6 (3d Cir. 2010) (holding that the LLFPA "does not apply to failure-to-promote claims").

[12] Ordinarily, the bracketed language in Alternative One concerning the two-year limit will be unnecessary: Because the charge filing periods (180 or 300 days) are shorter than two years, a timely charge will fall less than two years after the unlawful practice. The bracketed language is provided for use in cases where that is not true – for instance, where the plaintiff's charge was untimely but the defendant waived its timeliness defense.

discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1); see *Ellis v. Ringgold Sch. Dist*., 832 F.2d 27, 29 (3d Cir. 1987). Although the statutory duty to mitigate damages is placed on a Title VII plaintiff, the employer has the burden of proving a failure to mitigate. See *Anastasio v. Schering Corp*., 838 F.2d 701, 707-08 (3d Cir. 1988). To meet its burden, an employer must demonstrate that 1) substantially equivalent work was available, and 2) the Title VII claimant did not exercise reasonable diligence to obtain the employment.

. . .

The reasonableness of a Title VII claimant's diligence should be evaluated in light of the individual characteristics of the claimant and the job market. See *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 454 (3d Cir. 1992). Generally, a plaintiff may satisfy the "reasonable diligence" requirement by demonstrating a continuing commitment to be a member of the work force and by remaining ready, willing, and available to accept employment. . . .

The duty of a successful Title VII claimant to mitigate damages is not met by using reasonable diligence to obtain any employment. Rather, the claimant must use reasonable diligence to obtain substantially equivalent employment. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982). Substantially equivalent employment is that employment which affords virtually identical promotional opportunities, compensation, job responsibilities, and status as the position from which the Title VII claimant has been discriminatorily terminated.

In *Booker,* the court rejected the defendant's argument that *any* failure to mitigate damages must result in a forfeiture of *all* back pay. The court noted that "the plain language of section 2000e-5 shows that amounts that could have been earned with reasonable diligence should be used to reduce or decrease a back pay award, not to wholly cut off the right to any back pay. See 42 U.S.C. §2000e-5(g)(1)." The court further reasoned that the "no-mitigation-no back pay" argument is inconsistent with the "make whole" purpose underlying Title VII. 64 F.3d at 865.

The court of appeals has cited with approval decisions stating that "only unjustified refusals to find or accept other employment are penalized." *Donlin*, 581 F.3d at 89. Thus, for example, "the employee is not required to accept employment which is located an unreasonable distance from her home." *Id.*; *see also id.* at 89 & n.13 (plaintiff's choice – after her dismissal – of lower-paying job did not constitute a failure to mitigate because additional cost of commuting would have offset any additional earnings from alternative higher-paying job).

After-Acquired Evidence of Employee Misconduct

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), the Court held that if an employer discharges an employee for a discriminatory reason, later-discovered evidence that the employer could have used to discharge the employee for a legitimate reason does not immunize the employer from liability. However, the employer in such a circumstance does not have to offer reinstatement or front pay and only has to provide back pay "from the date of the unlawful

discharge to the date the new information was discovered." 513 U.S. at 362. See also *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995) (stating that "after-acquired evidence may be used to limit the remedies available to a plaintiff where the employer can first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."). Both *McKennon* and *Mardell* observe that the defendant has the burden of showing that it would have made the same employment decision when it became aware of the post-decision evidence of the employee's misconduct.

5.4.4 Title VII Damages — Front Pay — For Advisory or Stipulated Jury

Model

You may determine separately a monetary amount equal to the present value of any future wages and benefits that [plaintiff] would reasonably have earned from [defendant] had [plaintiff] not [describe adverse employment action] for the period from the date of your verdict through a reasonable period of time in the future. From this figure you must subtract the amount of earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.

[If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.]

You must also reduce any award to its present value by considering the interest that [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment. You must make this reduction because an award of an amount representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the time in the future when it would have been earned. It is more valuable because [plaintiff] can earn interest on it for the period of time between the date of the award and the date [he/she] would have earned the money. So you should decrease the amount of any award for loss of future earnings by the amount of interest that [plaintiff] can earn on that amount in the future.

[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], then you may not award [plaintiff] any amount for wages that would have been received from [defendant] in the future. **]**

Comment

There is no right to jury trial under Title VII for a claim for front pay. See *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay under Title VII is not an element of compensatory damages). In *Pollard* the Court reasoned that the Civil Rights Act of 1991

expanded the remedies available in Title VII actions to include legal remedies and provided a right to jury trial on those remedies. Therefore, remedies that were cognizable under Title VII before the Civil Rights Act of 1991 must be treated as equitable remedies. Any doubt on the question is answered by the Civil Rights Act itself: 42 U.S.C. § 1981a(a)(1) provides that, in intentional discrimination cases brought under Title VII, "the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of [§ 1981a], *in addition to any relief* authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent." *See also Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 78 n.1 (3d Cir. 2009) (explaining in Title VII case that "back pay and front pay are equitable remedies to be determined by the court").

An instruction on front pay is nonetheless included because the parties or the court may wish to empanel an advisory jury–especially given the fact that in most cases the plaintiff will be seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively, the parties may agree to a jury determination on front pay, in which case this instruction would also be appropriate. Instruction 5.4.1, on compensatory damages, instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and front pay.

Front pay is considered a remedy that substitutes for reinstatement, and is awarded when reinstatement is not viable under the circumstances. See *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that "when circumstances prevent reinstatement, front pay may be an alternate remedy").

"[T]here will often be uncertainty concerning how long the front-pay period should be, and the evidence adduced at trial will rarely point to a single, certain number of weeks, months, or years. More likely, the evidence will support a range of reasonable front-pay periods. Within this range, the district court should decide which award is most appropriate to make the claimant whole." *Donlin*, 581 F.3d at 87.

In *Monessen S.R. Co. v. Morgan*, 486 U.S. 330, 339 (1988), the Court held that "damages awarded in suits governed by federal law should be reduced to present value." (Citing *St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 412 (1985)). The "self-evident" reason is that "a given sum of money in hand is worth more than the like sum of money payable in the future." The Court concluded that a "failure to instruct the jury that present value is the proper measure of a damages award is error." Id. Accordingly, the instruction requires the jury to reduce the award of front pay to present value. It should be noted that where damages are determined under state law, a present value instruction may not be required under the law of certain states. See, e.g., *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the "total offset" method, under which no reduction is necessary to determine present value, as the value of future income streams is likely to be offset by inflation).

5.4.5 Title VII Damages — Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and therefore is not entitled to compensatory damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

Nominal damages may be awarded under Title VII. *See, e.g.*, *Bailey v. Runyon*, 220 F.3d 879, 882 (8th Cir. 2000) (nominal damages are appropriately awarded where a Title VII violation is proved even though no actual damages are shown). *See generally,* Availability of Nominal Damages in Action Under Title VII of Civil Rights Act of 1964, 143 A.L.R.Fed. 269 (1998). An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory damages. Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new trial, based partly on the ground that because the plaintiff had presented "undisputed proof of actual injury, an instruction on nominal damages was inappropriate." In upholding the grant of a new trial, the Court of Appeals noted that "nominal damages may only be awarded in the absence of proof of actual injury." Id. at 453. The court observed that the district court had "recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering." Id. Accordingly, the court held that "[t]he court's error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading." Id. at 454.

Nominal damages may not exceed one dollar. See *Mayberry v. Robinson,* 427 F.Supp. 297, 314 (M.D.Pa.1977) ("It is clear that the rule of law in the Third Circuit is that nominal damages may not exceed $1.00.") (citing *United States ex rel. Tyrrell v. Speaker,* 535 F.2d 823, 830 (3d Cir.1976)).